United States Court of Appeals for the Second Circuit

APPENDIX

76-7476

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United States Court of Appeals
For The Second Circuit

No. 76-7476

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of
David Buckley and Mary Buckley,
Plaintiff-Appellant-Cross-Appellee,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and
JEANNE DONOGHUE,
Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on
Counterclaims-Appellants-
Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
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JOINT APPENDIX—TRIAL TRANSCRIPT
Volume VI—A-3763–A-4595

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MR. GRUTMAN: Your Honor, forgive the interruption.

I have had a wonderful day off, the first time in six weeks. We brought a secretary down here today to go over the catalog of exhibits so that we could pull things together, and I wonder whether we could have permission for the secretary to have access to the exhibits which are not being used, otherwise she will be here another hour sitting in the back of the courtroom.

MR. MANDEL: We will have to suspend for a few minutes, while we do that.

MR. ROTHMAN: Wait for the recess.

MR. GRUTMAN: Thank you, your Honor.

MR. SHAW: I ask that this be marked for identification.

(Plaintiff's Exhibit 125 marked for identification.)

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Rubin, would you tell the Court how you are employed at the present time?

A At the present time I am working for Evans & Company in the trading department.

Q How long have you been employed by Evans & Company?

A For about one year.

Q Before that, how were you employed?

A Prior to that year I was working for W.E. Hutton, and before that I was working for Newburber Loeb from 1946 until it went out of existence.

Q When you were employed by W.E. Hutton, were you connec ted with Newburger Loeb Corporation, Inc.?

A No, I was not.

Q During the period you were employed by W.E. Hutton, was Newburger Loeb Corporation, Inc. involved in business in some way with W.E. Hutton?

A Yes, they were.

Q At the present time is there a Newburger Loeb division of Evans & Company?

A No, there is not.

Q Is there a business relationship between Newburger Loeb at the present time and Evans & Company?

A Evans & Company bought some of the branch offices of Newburger Loeb.

Q Was this about a year ago?

A I would say about a year ago.

Q Would you describe for the Court what your duties are in relation to the trading department?

Tell us what the trading department does and what you do in relation to the functioning of that department.

MR. MANDEL: In Evans & Company today? That's irrelevant.

Q Does the trading department of Evans & Company function by and large the same as did the trading department of Newburger Loeb in the partnership?

A Yes.

Q When you were employed by Newburger Loeb & Company, the partnership, you were employed in the trading department?

A Yes.

Q How long have you been working in Wall Street in a trading department?

A From about 1947 to the present.

THE COURT: Mr. Rubin, I never worked in a trading department. Tell me what is the trading department?

MR. SHAW: That was my question.

THE WITNESS: All securities are bought and sold in the trading department. We handle the physical execution. All is centralized into the trading department, and then we buy them on the proper exchanges, or we shop if they are unlisted securities. We handle bonds, municipal bonds, just about every equity and debt security that you can trade.

THE COURT: In other words, the customers' man tells you what to do, to buy or sell, and you know where to go to cause that to happen?

THE WITNESS: Yes.

Q Did there come a time when you became a partner in Newburger Loeb & Company?

A Yes.

Q When was that?

A In February of 1970.

Q Did you invest a sum of money?

A I invested, yes.

Q How much did you invest?

A $25,000.

Q Can you tell the Court what the circumstances leading up to your making this investment and becoming a general partner were?

A I worked for them, as I said, since 1946, and I guess it is everybody's ambition in Wall Street to become a general partner, which is probably the epitome of employment, and I worked hard all those years and finally I was recognized and invited into the

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partnership.

Q By whom?

A At the time Charles Gross and Robert Newburger.

Q Can you recall what Mr. Gross said to you, if anything, prior to the time you became a general partner and make this $25,000 investment?

A I don't think I can remember exactly.

Q Not exactly but in substance.

A I know they thought highly of me. They got me one day and said, "We are going to make you a partner," and I was delighted. That's about the gist of it at the time.

Q Did you ask them how much it was going to cost?

A I said I didn't have it in money, and they said it required a certain sum of money. I told them I didn't have it. A loan was arranged for me in the First National Bank.

Q Who arranged the loan?

A I imagine it was Mr. Gross and Mr. Stern.

Q Did you put up any collateral for it?

A Non-collateralized.

Q What did you do with the proceeds of the loan?

A As soon as I received the loan, I turned it over to Newburger Loeb & Company.

Q What size was the interest, if any, that you obtained from the partnership?

A It was 1 percent.

Q Have you paid back the loan?

A Most of it. I still owe some money on it.

Q Can you recall what information if any, you received from Mr. Gross, or from any other general partner of Newburger Loeb with respect to the financial affairs of the partnership.

MR .MANDEL: I object.

Q At the point when you made this investment and became a partner.

THE COURT: What is the date of this?

MR. SHAW: February, 1970.

THE COURT: What is the purpose of this proof, Mr. Shaw?

MR. SHAW: I think it is relevant on the issue of Mr. Gross' control over the partnership. I think it is relevant to the issue of what was testified with respect to Mr. Sloane and Mr. Kayne. I think it is relevant on the issue of credibility.

I also feel that it is relevant with respect to the issue which has subsequently come into the case with respect to the secret trading account, whether it was in fact secret, whether there was a general dissemination of financial information among the various partners, or whether it was operated as a secret or closed business.

THE COURT: I will sustain this objection.

Q Prior to the time you became a partner and made this investment, did you see a financial statement of Newburger Loeb?

A No, I did not.

MR. MANDEL: I object.

THE COURT: Sustained.

Strike it out.

Q Prior to the time you became a partner, or subsequent to the time you became a partner, did you ever see a financial statement or profit and loss statement?

A No.

MR. MANDEL: I object.

THE COURT: Same ruling.

That answer is stricken.

Q Prior to the time you became a partner and made the investment, did you receive any information from

Mr. Gross with respect to back office losses or whether the firm had been losing money?

THE COURT: Sustained.

Mr. Shaw, let's go on to something else. You said you wanted to make your record. I think that has been done.

Q At the same time when you became a partner, did any other employees or persons become a partner in Newburger Loeb?

A Yes.

Q Who?

A Jack Schaffer and Robert Therese.

Q In what capacity had Mr. Therese been employed by the partnership?

MR. MANDEL: I object. It is irrelevant.

MR. SHAW: This would become relevant.

THE COURT: How?

MR. SHAW: Mr. Therese was in charge of the back office.

THE COURT: Let's see what happens when he comes on as a witness.

Sustained.

Q I ask you the same question with respect to Jack Schaffer.

THE COURT: Sustained.

Q You indicated in response to the Judge's question how the trading department functioned with respect to the purchase and sale of securities. I would like you to be more specific, if you could.

When an order is received in the trading department from a registered representative, what is the first thing the trading department does?

A The first thing it does is read the order, naturally.

Q Assuming it understands the order, what is the next thing it does?

A We would then decide where the security is traded and we would go about starting the execution on its way.

As an example, if we received an order from a salesman or somebody on the New York Stock Exchange, we would have a telephone communication with the floor of the New York Stock Exchange, and we would phone the order to a telephone clerk on the floor who would then hand the order to the firm's broker to be executed.

Q The firm's broker? Is he also known as the floor broker?

A Yes.

Q Is he, in some instances, a member of the New York Stock Exchange?

A He has to be a member of the New York Stock Exchange or the Exchange where he is a broker.

Q Does he have a seat on the New York Stock Exchange?

A Yes.

Q Does he at least have use of a seat?

A Yes.

Q In addition to floor brokers, is there such a thing as a two dollar broker?

A Yes.

Q Tell the Court what a two dollar broker is.

A A two dollar broker is a broker on the floor of the New York or American Stock Exchange who executes orders for other brokers for a fee known as the floor brokerage.

Q When orders are executed on the floor of the New York Stock Exchange, a fee is paid, correct?

A A floor brokerage fee is paid only when the firm's broker does not execute the order.

Q If the firm's broker executes the order, no fee is paid?

A We don't pay our own broker a fee.

Q After the order is received and read and communicated to the New York Stock Exchange, what is the next thing that is done by the trading department?

A The order is executed. A report is transmitted back through the same channels that the security was bought or sold. This execution is time clocked.

Sometimes, a copy of the execution, or some kind of report is given to the salesman or whoever originated that order.

Q After giving the copy of the document to the salesman indicating the order has been executed, in which case the security has been purchased, what is the next thing the trading department does?

A Usually the orders are written on a multiple form. A part of this multiple form is then sent to the billing department, known in Wall Street as the P. and S. department, from which bills are originated and copies are sent out to a customer of this bill; copies are retained for back office procedures.

Q What do you mean by "back office procedures"?

A We have to keep an inventory of all the stocks we buy and sell and see that they are in proper customary accounts. If it is a margin account, copies go to the margin department to see that the proper margin is required on these transactions.

Q Is there any further step in relation to the typical transaction where the security is purchased that the trading department performs?

A That's the usual procedure of a transaction. It is bought and sold and reported to the proper people.

Q That presumes that an account has been opened, correct?

A Yes.

Q What would the procedure be with respect to the opening of an account?

A Well, the salesman, whoever is involved, has to open an account with what we call a new account form.

Q When you were with Newburger Loeb, the partnership, was there a computer system?

A Yes.

Q How did that system function with respect to the opening of an account?

A Well, we had a new account department. It was part of the operation. The pertinent information was given about an account, an account number was assigned to the account.

21 Q During the period 1969 and 1970 Newburger Loeb was a member of the New York Stock Exchange, correct?

A Yes.

Q Who was the floor broker for Newburger Loeb?

A In 1969? Robert Newburger was one, and I believe George Connor or Bill McGovern. Around that time -- I can't recall the exact time -- Mr. Connor's seat was transferred to Bill McGovern, and I don't know if it was 1969 or 1970 that we had another broker on the floor by the name of Joe Searles.

Q Would it be correct that during this period Newburger Loeb had two seats on the New York Stock Exchange?

A At least two.

Q I believe you indicated that having a floor broker enabled Newburger Loeb to save commissions, correct?

A That's correct. That's his function.

Q Can you recall the time when Charles Gross became a member of the Newburger Loeb firm, when he became a partner?

A The exact date I cannot remember.

Q Do you have that point of time in your mind?

A Yes.

Q Did there come a time when you met a man by the name of Walter Tech?

A Yes. He was an employee of Newburger Loeb.

Q What was his function?

A He was assigned to operations and eventually he became, more or less, Mr. Gross' assistant insofar as the operation of the business went.

Q I place before you plaintiff's Exhibit 125 for identification and ask you to look at it. I ask you whether you recognize that?

A I recognize some of the security transactions, and I recognize the account number.

Q What do you call that document?

A A monthly statement.

Q Do you recognize the document before you as a monthly statement of Newburger Loeb with respect to a particular account?

A I assume it was --

THE COURT: No assumptions.

A (Continuing.) I recognize this.

Q Was this an account that was maintained at Newburger Loeb?

A Yes.

Q Is this a record --

MR. MANDEL: Don't lead the witness. I object to leading the witness. He says he recognizes it.

I think it would be fair to ask him what it is that he recognizes.

MR. SHAW: Then the document, which speaks for itself, is being testified to.

THE COURT: This is a record, I take it, kept in the regular course of business?

THE WITNESS: Yes. I don't see monthly statements in my job.

MR. SHAW: I offer it in evidence.

Mr. Mandel has previously been furnished with a copy of this document. Part of it was annexed to the Ned Frank affidavit.

I am advised by Mr. Risher that all of it was annexed to his answers to interrogatories.

MR. MANDEL: No objection.

XX (Plaintiff's Exhibit 125 received in evidence.)

THE COURT: What is a 900 account?

THE WITNESS: That's the account number assigned to that special account.

THE COURT: In other words, it is a special account numbered 900 among the special accounts?

THE WITNESS: Yes.

Q Are you familiar with the numbering system used by Newburger Loeb during this period of time?

A Yes.

Q What does the number 900 refer to?

A 00900 is the designation of the individual accounts.

Q What does the number 00 mean?

A The prefix number, the first two digits, normally signify the branch office for the firm account, general ledger account, partners' account, etc. The first two digits identify the account geographically, where the account is located, but there are certain other accounts that have a special prefix.

Q What prefix was used during the period 1969 through 1970 to designate firm accounts?

A The prefix 42.

Q What prefixes were used to designate the various branch office accounts?

A Like 72 prefix was our 72nd Street office. 66 was our California office. 57 was our 57th Street office.

Q What was 42?

A Those were firm accounts.

Q In 1969, for how many years had you been employed in the trading department of Newburger Loeb?

A About 25 years.

Q During that period of time to your knowledge, did Newburger Loeb have a firm trading account?

A Not as a normal course of business.

Q What do you mean by that?

A Well, the firm did not trade --

We used to buy and sell securities for a quick profit. We did on occasion trade, but it was an investment situation for long term capital gains, we hoped.

Q On occasion, did the individual partners for their own account, have accounts?

A Yes, they did, and if the individual partners traded, they traded in their own individual accounts, not the accounts of Newburger Loeb.

Q How would the individual account of Robert Newburger or Andrew Newburger be numbered?

A The number would be significant. Exactly what the prefix was, I don't recall, but his personal account, he could have had more than one, he could have had a subordinated account to the firm, he could have bought and sold securities and replaced them, or he could have just opened a cash account and bought things individually for his own account.

Q Can you recall if the prefix would have been 60?

A No.

Q But, in any event, the third, fourth and fifth digit would refer to --

A That would be the individual.

Q And the first digit would refer to what?

A The first two digits would relate to the office and the type of account.

Q I believe you indicated that Newburger Loeb during this period of time prior to 1969 - 1970 did not have a firm trading account. Would you tell us the reasons why, if you know, this was so?

A Well, in all the years I worked for Newburger Loeb it was always a very profitable firm and there was no necessity to trade for the short term profits.

Q Is that the only reason?

A They were also a very conservative firm. We were making our income from commissions, from public customers, and underwritings, and that type of business. There was no necessity for Newburger Loeb to try to make a short term profit buying and selling a security. A lot of time we felt there was a conflict of interest.

Q Was there any further reason having to do with the nature of the trading account which was the reason the firm never had one in these previous years?

A Not that I know of.

Q Can you explain why you used the words "conflict of interest"?

A Well, I will see if I can.

We recommend stocks to the public. If we are recommending stocks to the public it would be a very simple thing to go and buy the securities and then recommend that security which would be a violation of business ethics of Wall Street; so every day we are handling various securities from our account and we don't know what they are buying or selling, and at times we could run a conflict or buy and sell the same security they liked to purchase. So we did not trade.

Q In other words, you might be buying when your customers would be selling?

A That's a possibility.

Q Are you familiar with the fact that there were certain restrictions imposed upon Newburger Loeb which were lifted some time in the Spring of 1969?

A No.

MR. SHAW: I would like to offer 58 for identification, which has been previously identified by Mr. Fitzgerald in evidence.

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MR. MANDEL: I object. It has nothing to do with this testimony. It is not relevant to anything.

MR. SHAW: I believe it is because during the pendency of the restriction for one thing the restriction prohibited Newburger Loeb from doing any trading. It is with the removal of these restrictions that we have the next step in the testimony, which is the opening up of the trading account, the so-called trading account.

THE COURT: There is no contention this is in violation of the restriction?

MR. SHAW: It is just that the restrictions were lifted just about before the trading account was opened up.

THE COURT: Then it is irrelevant.

MR. SHAW: I think it is relevant to show the background.

THE COURT: I sustain the objection to this.

MR. SHAW: Your Honor, at this point I would like to read certain portions of the partnership agreement in evidence. It is a lengthy document.

THE COURT: Is it in evidence?

MR. SHAW: Yes.

THE COURT: You want to read in evidence those things that are mentioned in your pleading?

MR. SHAW: Yes.

THE COURT: I have looked at them. While he was testifying I have looked at that.

BY MR. SHAW:

Q Directing your attention to the Exhibit before you which does not appear to be before you any longer, can you look at the first date, the earliest date in that document?

A It is very illegible on the first document.

Q Do you see the date of June of 1969?

A Yes. It either says June or July.

THE COURT: Gentlemen, at this time we will take a 10=minute recess.

(Recess.)

MR. MOSS: Your Honor, he is in Washington.

THE COURT: Very good. May the record show that we are talking about Robert Stern.

BY MR. SHAW:

Q What is the first date on that document?

A July, 1969.

THE COURT: Mr. Shaw, so I have some idea, this is the account you are talking about, and these are the firm's records on that account?

MR. SHAW: Yes, your Honor.

Q At or about the time when there is reflected on that document the first transaction in the account did you have a conversation with Charles Gross?

A Yes, I did.

Q Where did the conversation take place?

A I don't know if it was in the hallway or in his office exactly. I don't remember at the time, but I did have a conversation with him.

Q Was that at the offices of Newburger Loeb?

A Yes.

Q Will you tell the Court, to the best of your recollection, what you said and what he said, and what the substance of this conversation was?

A Charlie wanted to open an account and buy some securities. He didn't want to panic his other partners and he wanted to non-disclose the identity of the account.

Q He told you this?

A First he told me he wanted to buy some securities and not to say anything about them. Later on that day --

Q Let's get to the first conversation and then I will ask you about later on that day.

THE COURT: Let's get to the first conversation.

Q Just the first conversation that day.

A Charlie gave me an order to buy a certain security. That I can recall.

Q When he gave you that order, did he say anything about the way it should be handled?

A At the time, yes.

Q What did he say during that first conversation?

THE COURT: So we get this all in one piece, tell us what you said and what he said as best as you can recall, all the way through that first conversation until you are finished.

A Charlie gave me a certain security to purchase, and we directed the order on Charlie's instructions to a two-dollar broker on the floor, the reason being that there are certain rules of the New York Stock Exchange which govern certain types of orders, and he wanted to acquire the stock on a not-held basis so this one broker on the floor of the New York Stock Exchange, whom he directed the order to, who we were permitted to give a not-held order to, as the reports were coming back on this order I was in constant communication --

THE COURT: Is that the whole conversation that you had with him?

THE WITNESS: No, no.

He told me to hold all the reports and everything else and we would discuss it later.

THE COURT: That's all he said to you?

THE WITNESS: That's what I can remember right now.

THE COURT: Earlier when you said that he said not to say anything about it --

THE WITNESS: He said, "Don't say anything to my other partners. I don't want to panic them."

Q Then you went back to the trading department and executed the orders?

A Yes.

Q Before going back to the trading department and executing the orders, that is going out and buying the stock, did you have any further conversations with Mr. Gross before you went to buy the stock?

A At that point in time, I can't recall.

Q After you had purchased the stock did you have a conversation with Mr. Gross?

A Yes.

Q Where did you have that conversation?

A I believe it was in the office.

Q Who was present?

A At the time Charles Gross and myself, and then we brought somebody else in.

Q Who was that other person?

A Walter Tepper.

Q The three of you were in Charles Gross' office?

A Yes.

Q As best as you can recall, tell the Court what occured on that occasion.

A Mr. Gross wanted to, as I said, not panic his other partners, so he had asked me if there was some way that we could hide the identity of the account. I said I didn't know of any way because I was not familiar with the automation system and the summing system at the time.

So we brought in Walter Tepper, who was in operations at the time, and I believe Mr. Gross asked him if there was a way we could do it, and Walter Tepper said, "Yes, there is," and he came up with this 00 designation on the account.

Q What did he do?

A At that point the account was opened. I don't know how it was opened. Some form has to be filled out. Who filled it out, I don't know -- and the account has to be set up.

The forms must have been filled out because the account number was assigned and the number was given to me, which I filled in on the executions and processed the tickets accordingly with this designation.

Q You wrote down the number of the shares purchased, the stock purchased, and the stock number and the purchase price?

A Correct.

Q Did you have any further conversation that day, either in the morning before you purchased, or in the afternoon?

A I don't know if it was exactly that day or the next morning. In an automation system, a lot of papers come out of it, reports, copies of bills, and I was instructed not -- to be sure that these reports were not distributed in a normal manner of business.

In our board room, with certain partners, and clearance accounts, we had a conveyor belt where it went to and from, where orders came into us and the record copies went out on the conveyor belt. The partners and other individuals who were not geographically located with the conveyor belt, they had messenger service, whereby we used a messenger to deliver the reports, etc.

On this one occasion, Charlie said to me, "Be sure that nobody gets ahold of these," and when I got them I personally hand delivered them to Mr. Gross' office.

Q Was that pursuant to Mr. Gross' instructions?

A Yes, it was.

Q You used the words, "not held basis." Are there various --

THE COURT: What does that mean?

THE WITNESS: It would be much easier if I started --

Q Tell the Court the various types of orders.

A There are several types of orders:

There is the first order which is most prevalent and that is a market order. A market order is given to a broker and it is his responsibility to buy or sell that security at the best possible price at that time.

A limited order is a specified limit whereby we have to buy or sell that security at that limit for a better price for the company.

A not-held order is a time when it is not held -- where the broker is not responsible for the execution of the order. He can use his judgement on it depending on various conditions. He may think the security is going down and he might bid lower, or he might think it is going high and might take license and buy the stock. A not-held order, in essence, is not held to the sequence of the sales on the tape, and it is to the broker's discretion on the floor. Your own broker is not allowed to accept a not-held order.

Q Why?

A Conflict of interest. He has to buy, just like any other. I remember giving this order.

Q What was the name of the two-dollar broker?

A Michael Seidel.

Q What firm was he with?

A At the time he was with a firm that cleared through -- the Pearlberg firm.

Q Could these securities purchased this day have been purchased through Robert Newburger?

THE COURT: He siad no.

A Not with the terms of the order.

Q If they were purchased through Robert Newburger they would have had to be purchased another way?

A Yes.

Q What other way?

A They would have to be executed at the limit.

THE COURT: He said this is a not-held order. I understand what he is saying. He is saying you can't do that with your own broker. So once you have set up that term of sale you are forbidden to use your own broker.

I take it this is a speculative situation where you want to give the person on the floor who is the closest to the trade a chance to see if he can't do a little better for you.

THE WITNESS: He is on the scene, your Honor. If he sees sellers coming in he can withdraw his bid and bid lower.

Q Do the words "margin account" have any relevancy to the type of account that was opened up in this particular instance?

A The 2 accounts in this column would indicate what type of account.

Q Is there a 2 in that column?

A In this last account (indicating).

Q At least based on the number 2, assume it was opened up a certain way --

MR. MANDEL: I object to what he assumes.

Q Will you tell the Court what occured after this initial transaction? What happened in the ensuing days?

A I was instructed on the various occasions to buy more stock in the same fashion.

Q In the same fashion?

A Yes.

Q In other words, on a not-held basis each time?

A Yes, and directed to Seidel.

Q On each time, on each occasion, was a commission, a floor commission, paid to Mickey Seidel?

A It will have to be. It is a rule of the Stock Exchange.

Q If the order had been placed on a limit basis or market basis --

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Was there activity in this account from July of 1969 through September of 1969?

A It started here in July, August, and September. There was activity in the account.

Q What happened in September?

A 1969?

Q Yes.

A I have no idea.

Q What does the account reflect occuring?

A We sold out everything in September and we had a zero balance.

Q Was there a profit or a loss in the account according to that sheet?

A It looks like there is a $12,000 debit.

Q A loss?

A Yes.

Q Subsequent to September of 1969 was there any further activity in that account?

THE COURT: Don't these exhibits speak for themselves? He doesn't have any kind of knowledge.

THE WITNESS: This is not my normal thing, your Honor.

Q I'm sorry. February.

A In February we started to buy City Investing again.

Q What occured in February of 1970? Did you speak of Mr. Gross again?

A Yes. We handled it the same way.

Q What did he do and what did you do?

A Exactly what we did before. Mr. Gross gave me instructions to buy City Investing and I executed his instructions.

Q In the same way?

A Yes.

Q Through Mr. Seidel?

A To the best of my knowledge, yes.

Q Without putting the documents reflecting the execution of the orders on the conveyor belt?

A Yes. We used a messenger system. I was the messenger, nobody else.

Q Will you tell the Court how many shares were purchased subsequent to February of 1970?

MR. MANDEL: If that comes from the document --

MR. SHAW: May we stipulate that approximately $33,000 --

THE COURT: It won't be a stipulation.

MR. MANDEL: The witness has independent knowledge.

THE COURT: The exhibit is in evidence and to whatever extent it shows it, it shows it.

Read to me, Mr. Shaw, what it shows.

I take it this man has no independent recollection?

THE WITNESS: I execute them and I am looking for the long position. Unless this is incomplete, I only see 19,000 shares purchased on that.

THE COURT: Do you know the totals independently of this exhibit, Mr. Rubin?

THE WITNESS: No. It was a considerable sum, $33,000 to $40,000. I bought it over a period of time, I didn't keep the score.

THE COURT: So the exhibit speaks for itself in this regard, I assume.

Q Do you know what amount of money was spent on the purchase of those shares over all?

A No, I don't. All I was responsible for was the amount of shares on the price of the security.

Q Can you recall having a conversation with Ned Frank during May of 1970?

A A very vivid memory of it.

Q Was this conversation about this particular account?

A Yes, it was.

Q Would you tell the Court what the conversation was?

MR. MANDEL: I object to hearsay.

MR. SHAW: Mr. Frank is dead. This conversation relates to this account. There has been testimony already in evidence on many, many occasions, with respect to certain statements that Mr. Frank has made. I think it is as relevant to the handling of this account as any other testimony I can think of.

THE COURT: In the first instance, I will sustain it. Let's see if there is some reason for going back to it later in time.

Following that, did you have a conversation with Mr. Gross, or did someone have a conversation with Mr. Gross?

Q What did you say to Mr. Frank during this conversation?

A Mr. Frank, one day, very heatedly, called me in and --

MR. MANDEL: I object.

Q Strike from your testimony what Mr. Frank said to you. Tell us, if you can, if you can sift it out, what you told Mr. Frank.

MR. MANDEL: I object.

THE COURT: Is there any objection to the record showing on a particular date he advised Mr. Frank of this account?

MR. SHAW: I don't want to leave it there.

THE COURT: I don't think it is necessarily appropriate at this point. It is the conversation of somebody having to do with this thing.

MR. SHAW: It has to do with this particular account.

THE COURT: Mr. Frank is dead and not here to be examined.

THE WITNESS: Mr. Frank --

MR. GRUTMAN: May I invite the Court's attention to several facts. One is that the estate is being sued. It is a new provision in the federal rules where hearsay from a dead declarant may become admissible. My recollection is that it is no longer hearsay representation having to do with statements that were made in judicial proceedings. Your Honor will recall Mr. Frank filed an affidavit, and a test of admissibility is whether or not before the --

THE COURT: Call my attention to the rule.

MR. GRUTMAN: It is the hearsay exception. It is 803 or 804.

The test, as I understand it, is that if an adverse party has sufficient notice of whatever it is that the declarant is contending that then the Court in its discretion has the right to admit the utterance by the declarant. In this case we have testimony through Berkowitz what it was that Mr. Frank said. Reference has been made to the so-called Frank affidavit.

THE COURT: But not subject to cross examination.

MR. GRUTMAN: That's the point. Mr. Mandel, during his lifetime, knew what he said to the Court under oath and he didn't take his deposition.

Since Mr. Frank spoke as the compliance officer of the firm, it is quite germane to the central issue in the lawsuit. I think weighing admitting the evidence for whatever it is worth, this Court has the power under the new federal rules not to be precluded from consideration of this proof, but simply because Mr. Frank untimely died.

MR. SHAW: It is relevant to the claim that malicious statements were made without any foundation, made by Mr. Frank relating to Mr. Gross.

MR. MANDEL: I have been looking at the rule and apparently Mr. Grutman seeks to argue that Mr. Frank's affidavit constitutes formal testimony. The statute 804b1 says that testimony given as a witness at another hearing of the same or different proceedings or in a deposition, if there was direct or re-direct examination.

So clearly what may have been said to Mr. Rubin or by Mr. Rubin to Mr. Frank, does not come within that exception.

MR. GRUTMAN: Except paragraph 5, and I refer your Honor to that.

(Pause.)

I also refer your Honor to a, b, and c.

THE COURT: It requires that you have to advise your adversary you are going to use it.

MR. SHAW: I think that test was made by the fact that the Frank affidavit was included in the motion for summary judgement.

MR. MANDEL: He was alive then. We are talking about a conversation with Mr. Rubin.

THE COURT: If you are going to come under 5, there has got to be a making known to the adverse party an intention to offer the statement.

MR. GRUTMAN: Unless the attorney of the adverse party --

THE COURT: His intention to offer the statement -- did anyone tell Mr. Mandel you are going to offer this conversation?

MR. GRUTMAN: In the sense that the Frank affidavit specifically refers to it.

THE COURT: That doesn't mean you are going to offer it.

MR. GRUTMAN: That's obviously evidence that was going to be offered at this trial. It would have been at the nerve of this issue but for the death --

THE COURT: That doesn't meet subdivision 5.

MR. GRUTMAN: If your Honor will interpret it, in this fashion it is outweighed by the desireability of closing the door --

THE COURT: I am not so sure what Ned Frank may have expostulated at this point is necessarily appropriate for the trier of the fact to consider. Given the fact that he is not available for cross examination --

MR. SHAW: He is available for judgement. He is a defendant in the case. It is the best we have, and it is a statement made by the compliance officer under oath. Mr. Frank's affidavit and the proof of this, of this conversation, through Mr. Rubin, is all the evidence that is available to show that Mr. Gross did the --

MR. MANDEL: You have no place --

THE COURT: I am going to sustain the objections so let's go on.

MR. SHAW: In the interim, I found that a page was missing from 125, and I have added it to the document.

THE COURT: Yes.

BY MR. SHAW:

Q Mr. Rubin, without telling the Court what this is that Mr. Frank said to you on this occasion, tell the Court what you said on this occasion to Mr. Frank.

THE COURT: Sustained. I am not going to get into this conversation.

Q Prior to having this conversation with Mr. Frank, had you had a conversation with Mr. Gross about keeping this account secret?

A It was a well kept secret.

Q Was that pursuant --

MR. MANDEL: I object and move to strike it out.

THE COURT: Strike it out.

Q In the conversation with Mr. Frank, were you acting in accordance with the instructions that you had received from Mr. Gross?

MR. SHAW: That's binding on Mr. Gross. He was acting and making statements in certain ways under the direction of Mr. Gross. That's binding upon him, your Honor, Mr. Gross. Just as his conduct in taking the documents reflecting the discussion from the orders of the conveyor belt was relevant, so too might be the statements that he made to Mr. Frank in response to Mr. Frank's statement, "What is going on," if he tried to conceal it pursuant to Mr. Gross' instructions. That's what is relevant.

THE COURT: What do you say to that?

MR. MANDEL: I take it Mr. Shaw is representing that Mr. Rubin is going to testify that he made misstatements to Mr. Frank on Mr. Gross' instructions.

THE COURT: That's what I gather.

MR. MANDEL: Is that your representation?

MR. SHAW: Yes.

MR. MANDEL: I think a foundation question should be laid as to whether Mr. Gross instructed Mr. Rubin to make misrepresentations to anybody and, if so, to whom.

MR. SHAW: The record has been established on this. They tried to keep it concealed.

THE COURT: No, no. He said to forget agreements. He said: don't say anything to my partners. I don't want to panic them.

Q When you spoke to Mr. Frank in May of 1969 he was at that point a partner of Mr. Gross, correct?

A Yes.

Q Did he ask you questions regarding this account?

MR. MANDEL: Your Honor, the foundation has not been laid.

A Yes.

THE COURT: He said yes. I will permit him to say what he told him.

Q What did you tell Mr. Frank?

A He asked me if such an account existed.

MR. MANDEL: What was the date of this conversation?

MR. SHAW: May of 1970.

MR. MANDEL: He said 1969 a minute ago.

THE COURT: When was it?

THE WITNESS: It was May of 1970, approximately May of 1970.

THE COURT: What did you say to Mr. --

THE WITNESS: He asked me if such an account existed and I was very, very evasive.

THE COURT: Strike it out.

What did you say to him?

THE WITNESS: Well, I guess I kind of lied to him.

Q What did you say?

A I said, "Why are you asking me?" and he volunteered and said --

Q He said something. What did you say?

A I have to put it in context.

Q Unfortunately, we can't have it that way.

A It finally came out and I told him we did have such an account, we did have a position in the stock.

Q What did you say?

A Then he asked me other questions but I'm not permitted to talk about them.

Q What did you tell Mr. Frank?

A That there was such an account and we were long on the stock -- I am trying to figure this one out -- and how come he didn't know about it? He was the compliance officer, and in our daily review of business, which is a Stock Exchange function, we made a summary of all the daily business which we had tallied up, what business individuals were doing, buying and selling, and so forth, and we submitted the summary to the compliance officer. None of these transactions appeared in that summary.

Q Who filled out the summary?

A Various people.

Q You knew?

A No. Other people who worked with me.

Q Mr. Tepper?

A People who worked in the order room. Tepper did not work in the order room.

Q How long was your conversation with Mr. Frank?

A 15, 20 minutes.

Q Can you recall what you initially told Mr. Frank about whether or not this account existed and, if so, what sort of account it was?

A H never asked me about it before.

Q In that conversation, what was the first thing you said when you were asked questions about the account?

A As I said, I was evasive. He said he met the floor broker who executed the order for us and that's the way he found out about it.

Q You are telling us what Mr. Frank told you?

A No.

Q You said you were evasive. In fact, earlier, you testified you did lie.

A Being evasive, I did lie.

Q At whose request did you lie?

A Charlie did not ask me to lie. It was a well-kept secret up to that point.

MR. MANDEL: I object to that.

THE COURT: Strike it out.

Q Now that we have this side of the conversation in evidence, I ask you to tell us what it was that Mr. Frank said to you during this conversation.

THE COURT: Sustained.

Q Looking at the document before you, can you use that to refresh your recollection with respect to what the long position of Newburger Loeb was in this stock, City Investing, as of May, 1970?

A 35,000 shares.

Q Of City Investing?

A Yes.

Q What was the price at which those shares had been purchased during the month of May?

A An average price of 15 and a fraction,it looks like.

Q So that represented an investment of about half a millio n dollars, correct?

A Approximately.

Q Were the shares in that account subsequently sold?

A Yes. We did sell them out.

Q During what period of time?

A The exact date I cannot tell you.

Q Approximately.

During the ensuing month?

A Well, within a month or two.

Q Was there a loss in the account?

A Yes, sir, there was.

Q What was the loss?

A To tell you the truth, I cannot read the statement. I don't know what the purchase price was and what we sold them for.

Q Is there a debit balance?

A It was a debit balance of $80,882.

Q As of what date?

A Closing balance, July 31, 1970.

Q Can you recall having a conversation with Mr. Gross during July of 1970 with respect to a censure and fine?

A I don't know the exact date, but I read --

MR. MANDEL: Excuse me. Are we going on to another counterclaim on counterclaim with Mr. Rubin?

MR. SHAW: This relates to the censure and fine.

Q Of Newburger Loeb & Company?

A Charles Gross and Mr. Stern, for the censure of --

THE WITNESS: The conduct of Mr. Gross, specifically, yoru Honor. I am talking about the false statements contained in these special operating questionnaires of other violations of exchange rules. There was testimony about this weeks ago.

THE COURT: What are you offering this for?

MR. SHAW: To show Mr. Gross' involvement and awareness and intent with respect to this censure and fine.

THE COURT: I am not sure I follow all those nice, general words.

MR. SHAW: If Mr. Gross denied the firm had been censured and fined and lied to his partners about the mere existence of a $50,000 fine against the firm --

THE COURT: What allegation in your pleading or allegations in your pleading are you directing this towards?

MR. SHAW: This is related towards the allegation in the counterclaim to coun terclaim to the effect that Mr. Gross was responsible for the acts which resulted in the censure and fine of Newburger Loeb.

THE COURT: I would like to look at it.

MR. MANDEL: Do you have reference to the 11th defense offset?

MR. SHAW: Yes.

MR. MANDEL: That appears on page --

THE COURT: I have it.

MR. MANDEL: That's re-alleged in a summary --

THE COURT: That's no good.

MR. SHAW: It is involved in the 10th defense and 11th defense which are also offsets and counterclaims.

THE COURT: The 10th defense has to do with the lease.

MR. GRUTMAN: You are right, your Honor.

MR. SHAW: It relates to the financial condition of the partnership.

THE COURT: Let's go at the financial condition and see where we go.

BY MR. SHAW:

Q Mr. Rubin, did you read an article in a newspaper in July of 1970?

A Yes, I did.

Q After reading this article, did you have a conversation with Mr. Gross?

A Yes, I did.

Q Where did you have the conversation?

A In the offices of Newburger Loeb, someplace.

Q Tell the Court what you said and what he said.

A I read an article in the paper that a medium-sized firm was censured for $50,000 by the New York Stock Exchange for back office troubles, or whatever it was. I went over to Charlie and said, "This looks like Newburger Loeb."

He denied it being Newburger Loeb.

No firm was mentioned in the article.

Q Were you ever advised in July of 1970 by either Mr. Gross or Mr. Stern, any of the Sterns, that Newburger Loeb had been censured and fined $50,000 on or about July 12, 1973?

A I found out later. I cannot tell you when.

Q While you were a partner of Newburger Loeb prior to July of 1970 did you receive a monthly profit and loss statement on any occasion?

A Not that I can recall.

Q While you were a partner of Newburger Loeb, did you receive a financial statement on any occasion?

A The only financial statement I received was when the partnership was terminated.

Q That was in February of 1971?

MR. MANDEL: I move to strike that. Why is that relevant? Mr. Gross is out of the business.

THE COURT: Sustained.

Put your next question.

Q Are you familiar with the facts leading up to the transfer agreement?

A No.

Q Did you consent to the transfer agreement?

A Yes.

Q At the time when you consented, were you a general partner?

A Yes.

Q As of that point had you had certain access to financial information and did you discuss the situation in the business with various persons?

A I didn't have access to any financial information. The only information I had was from some of the other partners who I was friendly with, but the exact dollars and cents I didn't have any knowledge of.

Q Do you know what the balance in your capital account in Newburger Loeb was in February?

A I had a debit of a few thousand dollars.

Q What happened to your $25,000 investment which you had borrowed?

A It was not there.

Q What is the reason you went along with the transfer agreement?

A Because I had been with Newburger Loeb for all those years and they always were a profitable firm. I figured that maybe, you know, it is a temporary thing. I have never seen a decline, the amount of that loss, in all the years I have been in Wall Street. I thought you could turn around and it would be profitable again.

Q Were you concerned at all with respect to your possible liability to creditors of Newburger Loeb as a partner?

THE COURT: Sustained.

Q Was there any other concern or matter on your mind at this time?

A I needed employment.

Q Have you been employed ever since?

A Not as lucratively.

Q Do you have any view as to what would have happened insofar as your finances were concerned in the transfer agreement?

A Yes.

THE COURT: There is no foundation here at all. He saw no instruments or financial materials. He didn't talk to anybody.

I don't think you talked to anybody.

THE WITNESS: I talked to several people. They told me it is the best thing I could do.

THE COURT: You didn't make an independent determination as to what you should do, did you?

THE WITNESS: No.

MR. SHAW: I have no further questions.

CROSS EXAMINATION

BY MR. GRUTMAN:

Q You referred to Mr. Gross as Charlie. For how many years have you known Mr. Gross?

A More than 20.

Q When the opportunity was given to you to become a member of Newburger Loeb after 23 years as an employee, had you been seeking an opening into the firm as a member?

MR. MANDEL: I am going to object to this cross examination. This is a result of the confusion that comes from taking a course of action out of order. Mr. Grutman has no relationship, or his client doesn't have a relationship, to the counterclaims on counterclaims. That is strictly a matter between the plaintiff and the defendant.

MR. GRUTMAN: I happen to be the target defendant in the lawsuit, and Mr. Mandel has been spraying all over the lot with every witness. I have a few questions about the conspiratorial element and so-called "good faith" involved here. On credibility, I am entitled to ask a few questions.

Q Were you seeking to be admitted to the partnership or was this some offer that was made to you from out of the blue?

A It was an offer made to me out of the blue.

Q At the time you were asked to find $25,000 to invest for your own in Newburger Loeb, tell his Honor what your net worth was.

A $8,000 or $10,000.

MR. MANDEL: I move to strike all of this as irrelevant.

THE COURT: I will let it stand.

MR. GRUTMAN: I have no further questions.

THE COURT: Are there any further questions?

MR. MANDEL: I have some questions.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Rubin, I think you told his Honor that you remember the initial transaction that Mr. Gross made when he told you to open this new account; is that right? Did you say it was a certain security and you remember it?

A One security.

Q What was it? What security was it?

A The security was City Investing.

Q City Investing was first purchased when?

A Some time in 1969. Do you want me to look it up?

Q Yes.

A In July of 1969.

Q In fact the 00 account was opened before that City Investing transaction; isn't that right?

A Not that I can recall. It was opened at the time.

Q The document shows, does it not, earlier purchases of other securities in that account?

A I must have the wrong account here. It shows purchases of AMK.

Q What is the entry with respect to the charge?

A I have no idea. I am no bookkeeper.

Q You don't know what that means?

A No.

Q AMK stock was bought before City Investing stock, right?

A One day before.

I mainly spent most of my day with the transactions on the New York Stock Exchange. It is very possible that AMK at the time was trading on some other exchange or over the counter when it was bought.

Q AMK was on the New York Stock Exchange. As an order clerk you know that.

A It could have been on the American Exchange.

Q You don't remember?

A Offhand, I don't remember. I handled millions and millions of shares of securities. I have good recall where they are. Exactly where AMK was trading at, I don't know. There was some kind of merger going on at the time.

Q What is AMK?

A I remember what it used to be but they changed the name.

Q You don't remember where it was trading?

A At that time, no.

Q You gave an affidavit in this case, did you not?

A Yes.

Q And in the affidavit you didn't say that Mr.

Gross came to you in July of 1969. You said he came to you at the end of '69 or the early part of February; is that right or wrong?

A In my affidavit I said that. I didn't remember the dates.

Q Did you have certain customers for whom you were the registered representative?

A Yes.

Q What were the initial two numbers?

A 42.

Q For those customer accounts?

A I don't recall. I don't recall the exact designation. It was a 40 - - I don't remember --

Q Your customer accounts had the 42 peefix, right or wrong? Or don't you know?

A They did have a 42.

Q And the 42 prefix was for customer accounts in which office?

A The main office. There was a 40 designation of some other name with 41, 42, 43. Those were customer accounts.

Q Who called in the person to find out how to handle the Gross trading account? You did, didn't you?

A As I said before, I knew nothing about the mechanics of automation.

MR. MANDEL: I move to strike.

THE COURT: Strike it out.

Q Who called in the person to consult about that? It was you, right?

A I might have called him on Charlie Gross' instructions.

THE COURT: There is Mr. Tepper you are talking about?

A I was an employee at the time and Mr. Gross was managing partner, and he told me to get Tepper in his office. I called upstairs.

Q You say Mr. Gross was the managing partner in July of 1969?

A Yes. To the best of my recollection, he was the managing partner.

Q You think that Ned Frank was the compliance officer in July of 1969 until May of 1970?

A I didn't testify to that. I said he was the compliance officer when he consolidated me about what I am supposed to talk about.

Q When was that?

A Some time in May of 1970.

Q Dick Myles was a compliance officer then, wasn't he, Mr. Rubin?

A Offhand, I thought -- Okay. I thought it was Ned Frank.

Q Myles was there at the time, was he not?

A He might have been.

Q You know he was, don't you?

A Okay.

Q It is not okay.

MR. SHAW: Objection, your Honor.

Q How long did Mr. Myles stay with Newburger Loeb?

A I don't recall.

Q When did he start?

A I don't recall that, either.

Q So when you said that Ned Frank was the compliance officer you were guessing or mistaken.

MR. SHAW: Objection.

THE COURT: Overruled.

A When he consulted me about this account, he was the compliance officer.

Q You say Frank was the compliance officer in May of 1970? Is that your testimony, Mr. Rubin?

A As best as I can recall, yes.

Q You testified in the arbitration against Mr.

Gross, did you not?

A Yes, I did.

Q You testified about the so-called trading account, did you not?

A Yes.

Q In the arbitration you testified that the secret trading started in the latter part of 1969 or the early part of 1970.

MR. GRUTMAN: Could we have this in proper form. Let's have the question and answer rather than Mr. Mandel's free hand.

A When they showed me these documents, naturally my timing was off.

Q At the arbitration in response to a question by Mr. Laventhal were you asked this question and did you give this answer -- page 988 of the transcript:

"Question. Will you please tell us what happened in the latter part of 1969, the early part of 1970, concerning what Mr. Gross said to you as supervisor of the trading and order department of the partnership of Newburger Loeb?

"Answer. He called me into his office and he told me he wanted to open a trading account, but he looked to do it in some way where the other partners would not have any knowledge as to what he was doing and without computer setup I had to call in one of the operations people in our computer setup" --

I am stopping there. Is that what you said to the arbitrator?

A I guess I must have.

Q You called in whoever was called in?

MR. SHAW: He testified he called in Mr. Tepper.

THE COURT: The record speaks for itself and we draw such inference as we draw from it.

Overruled.

Q You didn't tell the arbitrators that Gross told you to call in Tepper, did you?

A I was not asked that question.

Q You were asked what happened; is that right, sir?

A That's correct.

Q Who decided to use the 00 designation? Was it Mr. Gross?

A Yes, it was.

Q You said to the arbitrators, and I am continuing with your answer:

"I had to call in one of the operations

people and in our computer setup we set up like a dummy account. I got in the branch offices where all the activity were hit. In other words, the main office where all the other accounts, whether the public accounts or the firm accounts, hit a 42 series, we set up this account with a 00."

I ask you this. Whose idea was it to use the double 00?

A It certainly was not mine.

Q Was it Gross or the computer man?

A I imagine it was Mr. Gross.

MR. MANDEL: I move to strike.

THE WITNESS: It was Mr. Gross. I will make an affirmative statement.

Q Mr. Gross instructed and Mr. Tepper --

A All my function was was to buy and sell securities.

THE COURT: Either you know or you don't know.

Who said, "We are going to use a 00?"

Did you hear somebody say that?

THE WITNESS: Mr. Tepper might have suggested it and Mr. Gross agreed to it.

I had nothing to do with it. But that's my best recollection.

Q I go now to the next question and answer.

"Question. Did he tell you what sort of prefix designation instead of 42 to use?

"Answer. Well, at that time not exactly. It was an operations man who --"

Was that your answer?

A My answer probably needed clarification. My answer is that he gave me that account number afterwards.

Q Who did?

A Tepper. He would have had to get that account number from Mr. Gross. He assigned the account number and he gave me the number.

Q Weren't you present during the second conversation?

A It takes time. You have to find out what account numbers are open. I was present.

Q The fact of the matter is beginning with the first of this transaction in July of 1969 every single one of these stocks, when bought, was paid for with a firm check, right?

A I don't know how they were paid for. I don't think they had to be paid for.

As I said before, I am an expert in what I do. I have nothing to do with paying for the margin requirement. My responsibility in Newburger Loeb, I had 50 people working for me, was to see we buy and sell the proper amount of stock for the right people.

Q As far as you know, every one of these securities was paid for by the firm?

A I have no idea. I have absolutely no idea.

Q Didn't you testify that the firm suffered a loss?

A It must have come out of the firm's capital.

Q Whenever one of these securities was sold, the money came into the firm, right?

A It probably realized some money into the firm..

Q You testified Seidel was used as the floor broker, right?

A Yes.

Q You picked him, did you not?

A No, I did not.

Q Who picked him?

A Charlie did.

Q Mr. Seidel was one of Ned Frank's best friends, was he not?

A Yes. He was probably one of the best brokers we used at the time, and that's why Charlie used him.

Before Charlie became a partner he used Seidel for himself.

Q Do you remember that at the arbitration you were asked these questions and you gave these answers on page 1,000:

"Question. In executing the trades in the City Investing whom did you use on the Floor?

"Answer. Because they were not-held orders we were not permitted to use our own floor brokers, so I had to use other two dollar brokers or broker.

"Question. Did you use Michael Seidel?

"Answer. I think I did."

Did you give those answers to those questions?

A Yes, I did.

Q Seidel was not the only two dollar broker you used on this account between July of 1969 and May of 1970, was he?

A To the best of my knowledge and what I can recall, yes, he was. He knew how to trade and he knew how the stock traded and we kept using him for that one particular issue.

Q You used Seidel for those reasons, right?

A There was no reason to change him. I was instructed to give him the orders at the inception of it. I considered it a standing instruction.

Q Did Mr. Gross tell you why he wanted to use Seidel?

A I am sure he thought he was a very good floor broker.

Q When you testified at the arbitration, basically you indicated that all you really remembered was the City Investing; is that right?

A That's right.

Q You now know there were numerous additional tradings beside City Investing, and it is all shown in the papers?

A I saw this document at the arbitration.

Q You have volunteered that it was a well-kept secret?

A Yes.

Q You have no knowledge, Mr. Rubin, whether Mr. Gross' partners on the executive committee knew all about these transactions all along, do you?

A No.

Q You don't know one way or the other, right?

A To the best of my recollection, none of the other partners knew about it. I used to consult periodically with Mr. Newburger before he went to the floor in the morning. We always compared notes as to what we were doing that day. He never once mentioned City Investing, or he didn't have any knowledge -- he was the man that was on the scene at the time. He was on the floor also.

MR. SHAW: May the record reflect how red the witness has gotten.

Q Mr. Newburger sold his seat in October of 1968?

A I don't know when he sold his seat. I know he sold the seat, but still he had access to certain New York Stock Exchange facilities. I don't recall the time he sold his seat.

Q You will recall that in the arbitration you were asked these q uestions and you gave these answers. I read from page 996:

"Question. At the time that he told you to open up that account, was it your understanding that Mr. Gross would use that account to trade?

"Answer. Yes.

"Question. Do you know whether or not Mr. Gross informed his partners on the executive committee?

"Answer. I don't know."

Were you asked those questions and did you give those answers?

A I guess I must have, if you are reading it.

Q To this date have you discussed with any of the executive committee members other than Robert Newburger, whom you have just spoken about, or possibly Ned Frank, whether they knew what was doing in this Gross trading account?

A After I became a partner, they invited all -- they had an executive meeting periodically. They invited all the partners in once a month and gave them a so-called synopsis as to what was going on in the firm. The profit or loss at City Investing was never mentioned, whether we were still long on it or whether we owned it or anything else like that. There was a lot of other information that was concealed from me.

Q Mr. Rubin, there are legitimate reasons, are there not, why the fact that a firm is picking up a large block position should be kept from the common knowledge of the employees of the firm and the registered representatives?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

Repeat that again.

(Record read.)

A As a normal course in business it should be kept confidential from the registered representatives, but not from the partners who own pieces of this long position.

Q The 00 designation figure, that was a general ledger account, right?

A It didn't signify anything. To my recollection, 00 was no terminology. There was a different number for general ledger accounts.

Q Are you saying that you know about the general ledger?

A I know absolutely nothing about the general ledger account, but at times I have handled transactions for that account.

Q I ask you if it is not a fact that every transaction in the Gross trading account was recorded in the general ledger.

A I cannot tell you that.

Q I ask you whether it is not a fact that a year-end statement was made for 1969 showing the profits or losses from the Gross trading account.

A I was not a partner at the time. I would not have any knowledge of profits or losses for the firm.

Q You saw statements for the firm, did you not?

A I saw these as an employee. I was an

employee in 1969.

I didn't see anything.

Q When Mr. Gross told you in July of 1969 what you say he told you, did you think he was doing something wrong?

A No.

Q Did you think what he was doing was proper?

A Not proper.

Q What was it that you thought about it?

A He was the managing partner of the firm and I never asked him his reason why he wanted to open that type of account that way except that he didn't want to panic his partners. That's all I thought about it. I was too intense in my area of the business at the time.

Q Despite this knowledge that you had at the beginning of Gross' activity, as you testified, beginning in July of 1969, you became a partner in February of 1970, right?

A Yes.

Q Do you remember the arbitrators asked you that question too?

MR. SHAW: Objection as to whether the arbitrators asked him a question.

THE COURT: Sustained.

Q By the way, who is Mr. Stoutenberg?

A Probably one of the arbitrators.

Q Do you know who he is on the Stock Exchange?

MR. SHAW: Objection. That's irrelevant.

A No, I don't.

Q I ask you whether Mr. Stoutenberg asked these questions during the arbitration and whether you gave these answers? I am reading from page 999:

"Question. I am not asking whether he was permitted to do it. I am asking you about your own feeling whether it was somewhat peculiar to have an account.

"Answer. Yes, it was peculiar."

Did you give that answer?

A If it is written, I gave it.

Q I will read further:

"Question. You borrowed $25,000 and became a partner?

"Answer. I didn't know what the firm's condition was like. I worked for them for a number of years. They had been very profitable and a very good firm, and I thought it was a profitable thing. I thought it was a good deal at the time.

"Question. Regardless of the secret acts that were going on?

"Answer. Yes."

Do you recall that testimony?

A Yes.

Q You have noted, have you not, that this account -- my copy is not so good -- but over in the left hand corner it says something about Charles Gross?

A It says 900 account, care of Charles Gross.

Q This Exhibit 125, is that a computer print out?

A It is a copy of one. It is a monthly statement.

Q The computer print out is a monthly statement?

A Yes.

Q Where were these monthly statements filed, if you know?

A Probably where we filed all our statements.

Q You did not take possession of the Gross account monthly statements and hide them, did you?

A No.

Q Mr. Gross never asked you to take possession of those statements and hide them?

A No, but they are addressed to Charles Gross --

THE COURT: No, no. You have answered that.

Q You don't know where they were kept or how they were kept or who had access to them?

A It was not my area of the business and I cannot answer that question.

Q You don't know what the bookkeepers saw or did with these statements, do you?

A No.

Q You don't know what the accountants saw or did with these statements, do you?

A No.

Q There never came a time when you felt it incumbent upon yourself to go to the executive committee and say to the executive committee as a group, "Say, do you know about this secret trading Charlie Gross has been doing since July of 1969?"

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A No. I never went to them. I also didn't know he was going to resign and --

THE COURT: Strike that out. There is no question pending. Just answer the questions responsively.

Q In 1972 you filed an affidavit to be used in summary judgement in this case, right?

A Yes, sir. That's the affidavit that you have been reading from.

Q At that time you were an employee of the corporation Newburger Loeb & Company, Inc., right?

A Yes.

Q And Mr. Risher was the operating head of the corporation; is that correct?

A Yes.

Q And you knew that Mr. Gross had claims against the corporation; is that right?

A Well, I had heard about it, but I didn't know it for a fact.

Q You knew your affidavit was going to be used in a litigation against Charles Gross, right?

A Correct.

Q You discussed your affidavit with Mr. Risher, did you not?

A No, I did not.

Q With whom did you discuss your affidavit?

A With Fred Kayne.

THE COURT: How much longer are you going to be?

MR. MANDEL: I will be a little longer.

THE COURT: The minute you have a convenient stopping point --

MR. MANDEL: This is as good as any. I have two more questions.

BY MR. MANDEL:

Q In July of 1972, where was Fred Kayne working?

A That was around the time -- I don't remember whether he was still with Newburger Loeb Inc. or he resigned. I don't remember.

Q Did he work in California?

A He might have worked in California. Around this time he resigned, according to my recollection.

Q You are definite that you discussed your affidavit with Fred Kayne?

A I discussed my affidavit with Fred Kayne, yes.

Q Did you approach him or did he approach you?

A I was very friendly with Chuck Sloane and they asked me if I would testify and I said I would.

Q I am not talking about testimony in the arbitration. I am talking about your affidavit in this litigation, Mr. Rubin. Do you know the difference between those two things?

A Not really.

MR. MANDEL: I think we may as well stop, your Honor.

THE COURT: We will recess until ten

o'clock in the morning.

(Off the record.)

(Discussion off the record.)

(Time noted: 5:10 p.m.)

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bbrf

Newburger, Loeb & Company et al.

vs 71 Civ. 685

Charles Gross et al.

New York, New York
July 29, 1975 - 10:00 a.m.

(Trial continued)

MR. MANDEL: Your Honor, I have a small application to make before I continue with Mr. Rubin. It concerns the order of proof which we were talking about yesterday; and this is what troubles me, your Honor.

We have all agreed that we have to try to finish this case in the next four days. Late yesterday I got some indications about witnesses which seemed to me different from the indications about witnesses that we had on Friday. I think it would be in order at this time to do two things:

First, to get a definitive indication from counsel who their witnesses will be, because I don't think it would be fair for the time to be exhausted placing my side at the end, in the shortage of time.

If we have a deinitive indication, that will help.

Further, I believe that probably at the present state of the record, Mr. Glatzer and Mr. Moss and Mr. Esterman have probably rested their defense to the counterclaims,and if so, I think that should be noted on the record.

I don't know whether Mr. Grutman has rested his defense or what his witnesses are about, but if Mr. Grutman is still on his defense, maybe to the extent that it is convenient, we should note who they are and maybe they should come before the witnesses on counterclaims to counterclaims.

MR. SHAW: Are you finished?

MR.MANDEL: Yes.

MR. SHAW: Your Honor, it seems to me we discussed this yesterday, and I made the observation that if we do what Mr. Mandel is suggesting it will be the first time in the trial that there hasn't been a mixture in the direct case of defense and during the defense case of something with respect to counterclaims.

Now in addition, on many occasions we have indicated the witnesses who we definitely have to call; and I have so advised Mr. Mandel as of late yesterday who the witnesses that we definitely have to call are.

Now, it seems to me that what we should be permitted to do is to continue with our defense to Mr.

Mandel's counterclaim, as well as our going forward on our counterclaims to counterclaims without any absolute demarkation because the issues all overlap.

THE COURT: I agree with both of you here. Let me ask Messrs. Moss, Esterman and Glatzer, had you rested on behalf of your clients, or do you intend to adduce more proof?

MR. GLATZER: Your Honor, we do not intend to produce more witnesses, but I am reluctant to rest since witnesses called by the other parties may be witnesses that will be helpful in our defense.

THE COURT: That is fair enough. In other words --

MR. GLATZER: We won't call any more witnesses, though.

THE COURT: The problem that I see is that Mr. Mandel is, from his point of view, defending in three or four directions at once, and given the pressures at the tail end of this case it seems to me he ought to have some idea as to what is before him, and by before him what can yet face him, in order to have to deal with it as he sees fit.

You have answered one question. All right, Mr. Mandel, they do not anticipate any further witnesses.

All right; now, Mr. Shaw, I am not going to bind you because --

MR. SHAW: It is difficult.

THE COURT: -- it is inappropriate, not difficult but inappropriate to do it, but also I do think that given the resources that everybody has, that Mr. Mandel should be made as aware as possible so that he does not spend unnecessary time, be made as aware as possible and as far ahead as possible as to any people that you intend to call.

MR. SHAW: Wherein there has been a definite ddcision upon my part to call a witness, your Honor, I have communicated this to Mr. Mandel. In fact, I have advised Mr. Mandel yesterday that Mr. Therese was going to testify today. Mr. Therese is sitting in the courtroom.

In addition, we have other witnesses who I have told Mr. Mandel about where we are not certain, however. I have not advised Mr. Mandel, and thiere is always an area where you make last minute decisions.

THE COURT: I think it would be appropriate that if you have some people who are maybe yes, maybe no, you give him the names of the maybe yes maybe no and you then call them or don't call them, and he is focusing on having to deal with them and we don't run into the problem which we had yesterday which caused some heat on the floor which had to do with Mr. Kane.

MR. SHAW: Yes, your Honor.

THE COURT: I just don't want counsel in a case that has gone seven weeks to have to cross examine where he has prepared for other cross examinations. That, in my mind, is inappropriate.

MR. MANDEL: Your Honor, I ask that Mr. Shaw state on the record now whom he will call and whom he may call. That will give us some idea of whether we should expand the time of trial as well as allowing me to prepare. I ask that --

THE COURT: The trial time with me makes no difference. We will stay here until this case is tried, and you will have full opportunity to deal with whatever you are given. My suggestion of finishing by Friday was for the personal convenience of everybody in the courtroom, but if the case goes over, you are not going to be squeezed at the end, just as I won't squeeze any other counsel at the end.

MR. MANDEL: I think it would be helpful in everybody's interest, if Mr. Shaw and Mr. Grutman would place on the record whom they expect to call as witnesses definitely and maybe, and I will do the same thing subject to expansion if I get some surprises from their testimony.

MR. SHAW: Who we intend to call today, tomorrow or from this point until the end?

THE COURT: The balance of the case. If you do not wish to do it, I am not going to order that you do it, but I would suggest that you advise Mr. Mandel off the record who they are, even the ones that are maybe yes maybe no.

If there is a problem with being prepared to meet them, I will deal with that at the time.

MR. SHAW: The only thing I can say in addition, your Honor, and I understand that I have the flexibility of either advising Mr. Mandel or not, to help Mr. Mandel I can tell him two names of persons who we may possibly call in addition to the names I have already given him; and that is Andrew Newburger and Dr. Philip Schulman may be called.

Now the other names I have given him include a representative of Peat, Marwick as well as Mr. Ragusson, who is scheduled to testify. I have already told him about Mr. Therese, who is in the courtroom, and he has been advised of Mr. Bamberger testifying today.

MR. GRUTMAN: Who is in the courtroom.

MR. SHAW: By that, however, I do not mean to be precluded from calling an additional witness. I think it is a good-faith evidence to try to tell him as many names as possible.

THE COURT: You govern yourself, given the sense that you make, of how I would like the trial to proceed so that everybody has a fair opportunity to develop all the facts.

MR. SHAW: Right. Now will Mr. Mandel give us the names of the persons that he was going to call?

MR. MANDEL: Yes.

THE COURT: He says he will.

MR. MANDEL: Yes.

THE COURT: Mr. Grutman, what is your feeling on that, that you do not wish to advise Mr. Mandel?

MR. GRUTMAN: Except to say that I have informed Mr. Mandel yesterday that Mr. Bamberger would be here to testify. I am certain that he made whatever preparations he had to make. I advised the Court yesterday that I did not foresee calling any more than two or three witnesses, Mr. Bamberger being one of them, and I am reasonably certain that the witnesses that I will call will cause Mr. Mandel no problem in being ready to cross examine them when they appear.

MR. SHAW: I hope it is clear, your Honor, that

I may call one or an additional other witness, but I am not revealing that at this point.

THE COURT: Mr. Grutman, let me ask you this. What is the tactical reason you have as counsel for declining to identify possible witnesses? I am not going to -- if you have a good reason --

MR. GRUTMAN: I will disclose it to the Court if the Court will hear me at the bench. I will come up.

(Discussion off the record.)

MR. MANDEL: For my part, your Honor, I have no hesitation in saying at the moment I foresee that we will call Mr. Gross and Mr. Settel, and possibly Mr. Dilger of the Stock Exchange.

THE COURT: Very good. All right.

MR. MANDEL: I would still like to finish this week, if possible.

THE COURT: Go ahead.

EDMUND RUBIN, the witness, previously duly sworn, testified further as follows:

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Rubin, you identified Plaintiffs' Exhibit P-125 yesterday and that consists of monthly statements of the so-called Gross trading account, 00900, is that correct?

A Yes.

Q Is it fair for me to say that when you gave your affidavit in this case, in this case, on July 7, 1972, you had not looked at that exhibit?

A I did not see that exhibit until it was presented to me at the arbitration.

Q And at the arbitration only part of it was presented to you, is that correct?

A That is correct. I don't know what I looked at. I looked at some statements.

Q At least is it fair to say that your testimony in the affidavit you gave in 1972 in July that your conversation with Mr. Gross about opening the account late in '69 or early '71 is inconsistent with the fact that the exhibit shows that the account was open early in July of 1969?

A It was my estimation of the time.

Q But is it fair to say that you wouldn't have had to guess or estimate if you had seen the exhibit at that time?

A Correct.

Q Is it also fair to say that when you testified at the arbitration, that basically the account was used

City Investing and very little else; you had forgotten the trading which took place in July and August and September of 1969?

A I remember that one specifically because of the amount of shares.

Q The large amount of shares being?

A Accumulated.

Q At a later time, is that right, in 1970?

A No.

Q No? Let's see if we can refresh your recollection this way:

Are you now familiar with the contents of Exhibit P-125 in a general way?

A I just glanced at it.

Q Do you now realize that there was some trading in the account in July, August, and September of 1969, and then no further trading in the account until February of 1970, is that correct?

A According to the statements that I glanced at, yes.

Q And to the best of your information, is that correct?

A Yes.

Q And is it also fair to say that the large position in City Investing which you remembered was a position taken in February and thereafter of 1970, is that correct?

A It was taken over a period of time. The exact days I didn't recall.

Q But beginning in February of 1970, is that right?

MR. SHAW: Objection, your Honor. That is contradictory to the document which speaks for itself. There are two positions taken.

THE COURT: He is inquiring as to this witness' ability to recall facts. That is what I understand it to be.

Q Is that correct, Mr. Rubin? You want to refresh your recollection?

A I remember the beginning when we first accumulated 10,000 shares, and then several months later when it was in February, we bought it again.

Q During the months of October and November and December and January, there was no activity in that account, right?

A Correct.

Q And whatever City Investment was bought in 1969 was sold by the end of September 1969, right?

A If that is what this statement says, that is what happened.

Q What I am getting at, Mr. Rubin, is whether it is not fair to sav that when you testified, without looking at the statements P-125, and you said certain things happened during 1970 and maybelate in 1969, what was in your mind was the second round of trading which began in February of 1970, is that correct?

A I assume so.

Q All right.

A Because that is the one that was most vivid in my memory.

Q All right.

Now, when you gave your affidavit in 1972, you discussed the facts with somebody before the affidavit was prepared, is that right?

A I did not discuss the facts with anybody except a lawyer when I --

Q All right. And who was the lawyer?

A A fellow by the name of Herb Roth.

Q Of the Finley, Kumble firm?

A Yes.

Q And Mr. Roth did not show you any of these statements?

A No.

Q That are embodied in P-125?

A That is absolutely correct. It was just what

I remembered.

Q What?

A It was just what I remembered.

Q Right.

A It was what I remembered.

Q And is it fair to say that you did not even know when you made your affidavit in July of 1972 that these statements which have been labeled P-125 were in existence?

A They had to have been statements in existence but I never saw them.

Q You assumed there were statements in existence somewhere?

A There has to be. Any kind of buying or selling, there has to be some kind of printout, and there has to be a statement of account; and I never saw them or had knowledge of them or thought about looking at them to refresh my memory.

When I went up to Mr. Roth, and I told him what was on -- what I had remembered, what I thought I had remembered, not specifically about day or month or year, I thought it was approximately around that time; it could have been a few months earlier or a few months later.

Q Did you tell Mr. Roth that you believed there were statements in existence relfecting these transactions?

A We didn't even discuss statements. All we discussed was how we set up an account, and we didn't discuss that particular account, the activity in it.

Q Mr. Rubin, do you know whether the date given for a transaction on the statements which are P-125 is the trade date or the settlement date? Do you understand my question?

A I understand your question.

Q Am I right that the first transaction shown is -- what is the date of the first transaction shown?

A 7/7.

Q That would be July 7th of 1969, right?

A Yes.

Q Is 7/7 the trade date or the settlement date?

A Settlement date.

Q Right, so the trade date would be what?

A A week prior.

Q So that actually the 0000900 account was opened about July 1st of 1969, is that correct?

A I assume so.

Q You are aware, are you not, that Charles Gross was not the managing partner of Newburger, Loeb on that date?

A No, I was not aware of it. My dates, as I say, it has been a long time, and I think Charlie Gross was the managing partner at the time.

Q Your present recollection --

A My present recollection that he was at that time the managing partner.

Q -- was that on July 1, 1969, Mr. Gross was the managing partner; is that your statement?

A Yes.

Q That subject to human error, is that correct?

A Yes.

Q I think you testified yesterday, Mr. Rubin, that Newburger, Loeb was an old conservative firm which had not gone in for trading, and there was no need for trading; is that correct?

A Speculative trading.

Q Do you remember a Rosen trading account in Newburger, Loeb?

A I remember a joint account of some, but I don't remember who was involved in it.

Q You don't remember the name Rosen in a joint account for speculative trading with Newburger, Loeb?

A You will have to refresh my memory. I do recollect an account.

Q With Rosen, right?

A Yes.

Q And you know Mr. Rosen and you have known him for many years, right?

A Yes.

Q He also had an originating house that cleared through Newburger, Loeb for many years?

A Yes, yes.

Q What is Mr. Rosen's first name?

A Alvin.

Q Now, do you recall that in 1969 or '70 Newburger, Loeb gave Mr. Rosen a million dollars worth of buying power financed by Newburger, Loeb on this joint speculative account?

A I did not know that.

Q You processed the orders in the Rosen account, did you not?

A The orders originated from Mr. Rosen and the reports went back to Mr. Rosen, and I knew there was a joint account; but I didn't know what the terms of the money involved or any -- or t[illegible]ofits and losses in that account.

Q But that was a trading account, right?

A As far as I was concerned, it was a Rosen trading account at the time.

Q What was the computer number of the Rosen account? What was the prefix?

A I have no idea. I can't remember. I believe I -- the prefix I don't remember. I think it was like -- if that account was 900 this account was 901 or 902 or something like that, but I don't remember the prefix on it.

Q How were the Rosen orders handled?

A The Rosen orders handled at that time?

Q Yes.

A He had a private office. He had a telephone communication with the trading room, and the orders were called to the trading room and then they were telephoned down to the floors of the Exchange, executed, and reversed back.

Q You are aware, are you not, that Exhibit P-125 is a statement consisting of monthly statements of a general ledger account, is that right?

A I am aware it is a monthly statement. I don't know if it is a general ledger account or Charles Gross' account or anybody's account.

Q I call your attention to the second page of Exhibit P-125, and I ask you to read out a reversal and --

A It says opening balance margin account to reverse

GL balance as of 7/25.

Q GL stands for general ledger, does it not?

A I am not a bookkeeper.

THE COURT: No, that isn't the question.

A It stands for general ledger, yes.

THE COURT: All right.

Q The second statement shows, does it not, in P-125, that the second month the account was in existence, the firm's bookkeepers reversed an accounting error; is that right?

A I am not familiar with bookkeeping terms. I don't know what that account -- what that statement -- what that thing is.

Q When you testified in the arbitration before you testified, with whom did you discuss your testimony?

A With Herb Roth.

Q No, in the arbitration.

A Who did I -- Don Laventhol.

Q Pardon?

A Don Laventhol.

Q Did you testify yesterday that you discussed it with Mr. Kane, too?

A I discussed it with him over the phone. I told him I testified and I gave an affidavit and I told him what was in it.

Q You told Mr. Kane you gave an affidavit?

A Well,I -- a deposition or whatever you call it. I don't know the term.

Q Before you testified in the arbitration, did anybody show you the monthly statements that are P-125 in evidence here?

A No.

Q Did you ask for them?

A No.

Q Did it ever enter into your mind that your testimony would be more accurate and fair if you looked at the monthly statements?

MR. SHAW: Objection, that is argumentative.

THE COURT: No, I will overrule it. Go ahead. You may answer it.

THE WITNESS: Would you mind repeating it again?

THE COURT: Read it back, please.

(Question read.)

A It didn't enter my mind.

Q The fact of the matter is, Mr. Rubin, that you have a grudge against Mr. Gross, is that right?

A No, I do not.

Q You dislike him.

A No.

Q You bear him ill will because you feel he got you into the partnership and made you lose $25,000.

A No.

MR. MANDEL: Nothing further.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Rubin, are you clear in your mind that the conversation which you testified to with Mr. Gross and Mr. Tepper was a conversation that you had, whatever the date was, when this account was first opened?

MR. MANDEL: I object to leading.

MR. SHAW: This is an error that Mr. Mandel went into.

MR. MANDEL: Just leading. Mr. Shaw is testifying for the witness.

THE COURT: Yes, I am going to sustain that objection. You want to ask him the question in a different form.

Q What is your best recollection as to the time when you had the conversation with Mr. Gross and Mr. Tepper in relation to the date when the account was opened?

A My first recollection was toward the end of '69; but as time went on, et cetera, and after I testified and I saw the statements, then I found out that the time was prior to the time that I had stated in my first affidavit.

Q And how do you fix that time?

A It was just an approximation in my mind.

Q Do you fix the time based upon the account itself?

A Just to my recollection.

Q All right. Now when the account was opened, do you have any recollection as to how long it had been that Charles Gross was the general manager, managing partner of Newburger, Loeb?

A To my recollection, I thought Charles Gross was the managing partner of Newburger, Loeb all of '69.

Q In any event, you are clear that he was the managing partner when the account was opened up?

MR. MANDEL: I object.

THE COURT: No, sustained.

MR. SHAW: All right.

THE COURT: Sustained. He is unclear about that. That is what he said.

Q You were asked on cross examination by Mr. Mandel whether on any occasion you had any conversation with any of the partners of Newburger, Loeb as to whether they knew what was going on in this particular account, Plaintiffs' Exhibit 125. I ask you that question specifically with respect to Ned Frank.

Tell us what conversation you had with Ned Frank as to whether he knew what was going on in this account?

A Ned Frank found out what was going -- he --

MR. MANDEL: One moment, your Honor.

Q What he said to you.

MR. MANDEL: We went through this yesterday on hearsay and it was ruled out. When I asked this gentleman the question I eliminated Frank from my question.

MR. SHAW: No, he didn't. My recollection, your Honor, in fact Mr. Grutman and I made a little note at that p[illegible]t that this was specifically asked, and I believe the do[illegible] has definitely been opened.

THE COURT: I will take the conversation and strictly as conversation and this is a statement of what Ned Frank said and it will be taken only for what he said at this point. What did he say?

Q First tell us when you had the conversation.

THE COURT: We have that established. Mr. Rubin, you had a conversation with Ned Frank. What did he say to you?

THE WITNESS: Okay. He called me into his office and he asked me if the firm owned City Investing.

I was very evasive in the beginning. I said I had dinner or something and I met the forward broker Mickey Seidel and he said that he knew we owned a lot of stock and he was wondering if we still had it or we sold it out.

I said, well in that case I guess you know we do own City Investing and we do have it in a certain account.

That is all the conversation that I can recall that I had with Ned Frank.

THE COURT: I see, all right.

THE WITNESS: He was pretty adamant afterwards.

THE COURT: No, no, just give us the conversation.

Q Thereafter, did you have a conversation with Ned Frank about the account?

A Yes, I did have a conversation with him, and he didn't have any knowledge of that account.

THE COURT: No, strike that out. Strike that out.

Q What did Mr. Frank say to you thereafter, if anything, about the account?

A I can't remember.

Q Thereafter, and by thereafter I mean after the time you had this conversation with Ned Frank for the first time where you were "evasive", did you have any conversation with any of the other general partners of Newburger, Loeb about the account?

A No, I did not.

Q Thereafter, did any of the partners of Newburger, Loeb advise you that they knew of the existence of this account?

A Not to my recollection.

Q I believe Mr. Mandel asked you questions with respect to what the reason, if any, for directing these orders to Mr. Seidel was. Can you recall those questions?

A Yes.

Q You testified --

THE COURT: Mr. Shaw, are you going to bring out anything -- that has been gone into by you on direct and by Mr. Mandel on cross.

MR. SHAW: Just one point; your Honor.

THE COURT: All right, let's go to it.

Q Was the fact that these orders were placed on a not-held basis in any way relevant or did it have any effect with respect to the nature of the purchases made?

A Well --

MR. MANDEL: I object.

THE COURT: Yes, sustained. They were on a not-held basis that required going to this $2 broker. Now what else, Mr. Shaw.

Q Did the fact that the orders were placed on a not0held basis really require handling the orders through Mr. Seidel, in your opinion?

A In my opinion --

MR. MANDEL: Your Honor --

A -- we got better execution.

MR. MANDEL: One moment.

Q You got better execution?

A Yes.

Q So it did affect the order?

A It affected the price of the order, sure.

Q I believe you indicated in response to Mr. Mandel's questions that these transaction were peculiar and they were not proper.

Will you tell the Court why you handled these transactions?

A Why I handled these transactions?

Q Yes.

A Because I probably was more qualified than anybody else in the trading department to handle them and --

Q Is there any other reason?

A Well, except what I had said prior, that we were keeping it quiet and that is one reason why I was handling the transactions, so nobody else should have any knowledge of them.

Q Is there any other reason why you did this?

A Well, on instructions from Mr. Gross, I mean, to keep them quiet and I kept it going.

MR. SHAW: No further questions.

MR. GRUTMAN: Could I see Exhibit 125 for a moment, please?

THE COURT: Where is 125?

(Document handed to Mr. Grutman.)

REDIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Rubin, the document in evidence, Exhibit 125, in the upper left-hand corner has an account number which begins with the prefix 00. You see that on that?

A Yes.

Q I show you a document which I have had marked as Finley Kumble Exhibit GG for identification. Would you look at that set of papers which I have just handed to you. Do you recognize those papers to be ledger cards regularly kept by Newburger, Loeb?

A I recognize them as monthly statements.

Q All right. Can you tell me whether or not that monthly statement is the Rosen trading account?

A To the best of my knowledge, it is.

MR. GRUTMAN: I offer the document in evidence.

MR. SHAW: No objection.

MR. MANDEL: No objection.

(Defendant Finley, Kumble Exhibit GG received in evidence.)

MR. GRUTMAN: Your Honor, I would simply like to call to the Court's attention that the account designation for this Rosen trading account does not begin with the prefix 00 but as an account designated 97-20901.

No further questions.

MR. MANDEL: One question.

RECROSS EXAMINATION

BY MR. MANDEL:

Q What does the double prefix 97 indicate to you?

A I don't remember right now. It has been a lot of water under the damn, and I have worked under two different automation systems.

Q Did you testify on direct that in your opinion all of the accounts in the main office should have been labeled 42?

A I thought that at the time, yes, and I -- that is correct.

MR. MANDEL: Nothing further.

MR. SHAW: Nothing further.

MR. SHAW: Thank you, Mr. Rubin.

(Witness excused.)

MR. GRUTMAN: We call Michael Bamberger.

MICHAEL A. BAMBERGER,

called as a witness by Defendant Finley, Kumble, being first duly sworn, testified as follows:

MR. MANDEL: This is defensive material and not on the current claims?

MR. GRUTMAN: That is correct.

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Bamberger, are you an attorney duly licensed to practice law in New York State?

A Yes, I am.

Q In what year were you admitted to the Bar?

A In 1960.

Q You want to keep your voice up, please, Mr. Bamberger. From what college were you graduated?

A I graduated from Harvard College.

Q And what was the year of your graduation?

A 1957.

Q When you were graduated were you graduated with any honors?

A Yes, Magna Cum laude, high honors.

Q After leaving Harvard College, what law school did you attend?

A I went to Harvard Law School.

Q While you were at the Harvard Law School, Mr. Bamberger, were you an editor of the Harvard Law Review?

A Yes, sir, for the last two years I was there, for 1958 through 1960.

Q When you were graduated from the Harvard Law School, what is the next thing that you did in pursuit of your career?

A The summer following my graduation from law school, I received a grant from the Harvard Law School to do traveling research in the field of the application of administrative law to state and local commissions against discrimination, and I did that for the summer and wrote a fairly long piece which was published in the Harvard Law Review the following Christmastime, I believe.

Q Was that the end of your academic life, so to speak?

A Yes, it was.

Q Did you then enter what is called the private practice of law?

A Yes, sir.

Q What firm did you associate with?

A In the fall of 1960 I became associated with the firm of Proskauer, Rose, Goetz & Mendelsohn.

Q For how long did you reamin with the Proskauer firm?

A I was with them, with the exception of eight months where I was in military service, until December 9, 1969.

Q Would you tell his Honor, Mr. Bamberger, before what Bars you are admitted to practice, what professional organizations or associations you are a member, what committee work you have done in any Bar Associations, and whatever other professional organizational activities you have engaged in as a lawyer?

A I am a member of the Bars of the Southern District of New York, the Second Circuit, and the United States Supreme Court.

I am a member of the American Bar Association, and I am a member of its committee on obscenity and the law.

I am a member of the State Bar Association and have previously been a member of its committee on federal legislation.

I am a member of the New York County Lawyers

Association and have previously been members of its committee on civil rights and committee on professional economics.

I am a member of the Association of the Bar of the City of New York, have been a member and secretary of the committee on state courts of superior jurisdiction, and am presently a member of the committee on corporation law.

Q For what length of time have you been on the Association of the Bar's committee on corporation law?

A I have just finished my -- the second year of a three-year term.

Q In the corporation law committee of the Association of the Bar of the City of New York, does that committee consider legal matters that relate to partnership entities as well as corporate bodies?

A Yes, it does, in this year the corporation law committee requested of the executive committee of the Association a clarification whether its mandate included partnership law, and it did so, and that was because at this time there is a revision of uniform limited partnership law going on, and the Association of the Bar had been requested to work with the revision group in terms of giving comments, and thereafter a subcommittee of the committee on corporation law was set up of which I am a member, which works as liaison with the committee to revise the Uniform Limited Partnership Act.

Q Have you personally been active in familiarizing yourself with that body of law?

A Yes, I have.

Q In the nearly nine years that you were with the Rosenman firm --

A Proskauer firm.

Q Proskauer firm, beg your pardon, what was the area of your principal activity?

A I worked in the area of corporate law, including partnership law, for approximately five years of the nine.

For four years of the time I worked in the field of litigation, which was broad, including all types of litigation.

Q Are you presently a member of the firm of Finley, Kumble, Underberg, Heine & Grutman?

A Yes, I am.

Q In what year did you come to the Finley, Kumble firm?

A I came to the Finley, Kumble firm in January of 1970.

Q At the time of your coming to Finley, Kumble, were you an associate of the firm?

A Yes, I was.

Q When were you made a partner, Mr. Bamberger?

A February 1, 1971.

Q Upon coming to the Finley, Jumble firm, in what area of the law did you spend the principal part of your professional life?

A Corporate and business law.

Q And was there any one particular partner with whom you worked most closely in corporate and business problems at Finley, Kumble?

A When I came to Finley, Kumble, Robert Persky was in charge of that area of the firm's business.

Q And did you work with him in serving the clients of the firm in that area?

A Yes, I did.

Q Sometime in the fall of 1970, did you as a lawyer at Finley, Kumble, receive an assignment to have anything to do with a client of the firm called Newburger, Loeb?

A Yes, I did.

Q What is your recollection of the first professional connection that you had with the Newburger, Loeb client of Finley, Kumble?

A My recollection is that sometime in the early fall or late summer of 1970, that I sat in a discussion concerning the -- a general discussion concerning the affairs and some of the problems of the Newburger, Loeb partnership at that time.

Q Who was present at that meeting?

A To the best of my recollection, Mr. Persky, Mr. Risher, Mr. Muh, and I believe Mr. Kayne.

MR. MANDEL: I am sorry I missed the last name.

THE WITNESS: Kayne.

Q At the time you participated in the meeting you just mentioned, what was Finley, Kumble's relationship to Newburger, Loeb?

A At that time, we were handling a few selected matters for Newburger, Loeb.

Q What were they, do you recall?

A The largest one, which I recall,was a question of attempting to get out of a lease which the partnership had entered with respect to One New York Plaza.

Q Was that handled by you or by someone else in the firm?

A That was handled by someone else.

Q And that person was who?

A Mr. Underberg.

Q Was he then chief of the real estate department of the firm?

A Yes, he was.

Q Beside the One New York Plaza lease problem, what was any other problem of which you were aware?

A There were problems -- I don't know whether they came at the first meeting but they came not too long thereafter, with respect to the financial capability of the partnership, and particularly with its net capital position as far as the New York Stock Exchange was concerned.

Q At the time that that problem was first made known to you, was Newburger, Loeb still a clearing firm?

A Yes, it was.

Q Were arrangements made for Newburger, Loeb to cease being a clearing firm?

A That was one of the first requests that the New York Stock Exchange made that I was aware of.

Q Ultimately was an arrangement made with W. E. Hutton to become the clearing house for Newburger, Loeb?

A Yes, sir.

Q Did you participate in any way as a lawyer in the document that formalized that transaction?

A Yes, I drafted the first draft of the document, and negotiated the document with house counsel for W. E.

Hutton.

Q Approximately what time are we speaking of in terms of months, Mr. Bamberger?

A That would either be September of the early part of October.

Q Do you have a recollection --

A 1970.

Q All right.

Do you have a recollection of the first time that you met Fred Kayne?

A No, I do not.

Q Do you have a recollection of having edited some remarks which Fred Kayne prepared and dictated at the Finley, Jumble office and which he delivered to executive committee meeting which was convened on the premises of Finley, Kumble sometime in the month of August 1970?

And I will hand up to you a copy of the exhibit which has been received in evidence and is Defendants' Exhibit S.

A No, I have no such recollection one way or the other.

Q All right. Have you ever seen that document before I just handed it up to you?

A I do not know whether I have seen it. I have no recollection of having seen it before.

Q Sometime in the month of November of 1970, did you meet or form an acquaintanceship with a man by the name of Richard Miles?

A I either met him or spoke to him on the telephone in the fall of 1970.

Q I show you a document marked Finley,Kumble Exhibit AA, letter of November 13, 1970, addressed to you from Richard Miles in Re. Newburger, Loeb versus Buckley.

Would you look at that document and does it refresh your recollection as to the circumstances of receiving the contents of what accompanied the letter?

A During that part of the fall of 1970, my firm had become the principal counsel for Newburger, Loeb, and a number of matters were turned over to us, litigation matters and certain other types of matters and I was the principal person to whom the documents concerning the matters or the files concerning the matters was sent, and then I routed them to the appropriate person or persons within the firm or else handled them myself if it were appropriate.

Q You were not a litigating associate in the firm in November of 1970, were you?

A No, I was not.

Q When you received that communication from Mr. Miles in November of 1970, I show you Finley, Kumble Exhibit BB and ask you whether after receiving AA you then routed the file that Mr. Miles sent to you to the attention of Mr. Grutman?

A Yes, I did.

Q At the time that you sent the file to Mr. Grutman, did you look through the file?

A Yes, it is my practice when a litigation matter comes through my hands, having been a litigator for a relatively short period of time, the one thing that I do check is to find out what the time pressure is, and I did look through this file, as is my practice, and I see from my memo here I noted that the matter had been held in abeyance pending successor counsel, so that there was no great pressure and I mentioned that fact in the memorandum that I addressed to you.

Q Held in abeyance in the context of an arbitration, is that correct, Mr. Bamberger?

A Yes.

Q Do you recollect at the time that you perused the file whether or not you saw a memorandum from predecessor counsel relating to an interview held on or about September 15th with a man named Jordon? Do you recall having seen such a document?

A No, I have no recollection one way or the other.

Q After the file had been received from Mr. Miles and routed to the attention of Mr. Grutman, did you have anything further to do with the prosecution or handling of the Buckley claim or the Buckley matter?

A No, sir.

Q Sometime in the late fall and proceeding through whenever in the late fall it began until February 11, 1970, did you have any professional connection with the negotiations and the plans and the drafting of instruments relating to the reorganization of Newburger, Loeb?

A Yes.

Q Would you tell his Honor how much of your time you spent on that matter?

A I would estimate now that, particularly during the latter portion of that period, being from about the middle of December until the middle of February, because there is cleanup after the closing took place, that I probably spent close to one half of my time.

Now that is not evenly -- obviously the periods that are blocked out heavily and periods where I had significantly less to do with it.

Q Who was the partner in charge of dealing with the reorganization of Newburger, Loeb?

A Robert Persky.

Q And who was second in command under Mr. Persky in the Finley, Kumble organization?

A Myself.

Q And besides yourself and Mr. Persky, were there other associates who handled the corporate side of the reorganization problems?

A One that I know of, William Rosenblum, spent a fair amount of time on the matter.

Q And do you recognize anybody else?

A Not at this time.

Q Was Rosenblum coordinated with you or junior in authority to you?

A Junior.

Q Mr. Bamberger, when did you first start participating in the role as a lawyer having to do with the corporate problems of the reorganization of Newburger, Loeb?

A The first specific recollection that I have is that sometime in the middle of December of 1970, I attended a meeting at the New York Stock Exchange.

Q Who was there?

A I believe the meeting was with Mr. William Dilger. Mr. Risher was there, I was there, I believe Mr. Persky was there, and Mr. Muh may have been there, but I am not sure.

Q Was this the first meeting that you had attended outside of the Finley, Kumble office concerning the reorganization?

A To the best of my recollection.

Q And was that meeting held before December 31st?

A Yes.

Q Were you aware of the letter which the New York Stock Exchange had sent to Newburger, Loeb under date of November 17, 1970 threatening that unless there was a reorganization the firm would be suspended?

A Yes.

Q On or about December 31st, a certain document was executed in what has been described as an all-night marathon session at the Finley, Kumble office.

Did you help in the drafting of that document?

A Yes.

Q Were you present at the so-called December 31st closing?

A Yes.

Q Up until that time, Mr. Bamberger, had you met Charles Gross?

A No, sir.

Q Or had you met his lawyer, Philip Mandel?

A Not to the best of my recollection.

Q You had, however, met Arthur Silverman, did you not?

A I believe so. I am not sure whether I met him before December 31st or thereafter.

Q Beside the meeting at the New York Stock Exchange to which you referred and which you say took place before December 31st, were there any other meetings before December 31st outside of the Finley, Jumble office which you attended having to do with negotiations concerning the reorganization of Newburger, Loeb?

A Not that I can presently recall.

Q Up to December 31st, Mr. Bamberger, had anybody told you whether any of the general partners, withdrawn general partners, limited partners, or withdrawn limited partners, or subordinated lenders of the Newburger, Loeb partnership were either balking or refusing to go along with the provisions of the agreement embodied in the December 31st agreement that was sent to the Stock Exchange?

A Well, the whole problem of negotiating this transaction -- the whole problem of negotiating this transaction was that there were various people and various groups of people balking at various times and the reason that it ended up in a marathon with everybody basically in a single room for an extended period of time was that the various -roups and the various people involved all wanted to make sure that they were getting as fair a deal as the other people were getting,and when you deal with that many disparate groups and people with different interests and different views, it becomes difficult.

There were all kinds of -- it was always a question whether or not we could get something signed by all the people which was agreeable.

Q Now Mr. Bamberger, in drafting the proposed transfer agreement, had you had an opportunity to see the articles of limited partnership of the Newburger, Loeb partnership which governed the partnership through the year 1970?

A Yes.

Q Was it your understanding that for the transfer agreement to be consummated, that the signature of a withdrawn general partner was or was not required?

A Was not.

Q At the time that the marathon session was held, of the persons who could or would vote, was there anyone who refused to sign the December 31, 1970 document, among the general partners, limited partners, and subordinated lenders?

A Not to the best of my recollection at this time.

Q Was there some reason why this document had to be signed on December 31st?

A Yes.

Q What was it?

A The New York Stock Exchange had said that unless a document signed by all the parties involved and therefore representing an agreement of all the parties, was delivered to the Stock Exchange by noon on December 31st, that the Stock Exchange would suspend Newburger, Loeb and proceed to liquidate it; and that is why we had to work through the night because we were on this time pressure.

Q So that document was executed and it was delivered to the Exchange, correct?

A Yes.

Q Did the document require, in order to be finally implemented, the preparation of certain additional schedules and certain other refinements?

A Yes, because of the time pressure, all of the addenda were not completed sufficiently in time.

Q Between January 1, 1971 and February 11, 1971, did you continue to remain with the Newburger, Loeb reorganization matter in the Finley, Kumble office?

A Yes.

Q Did you participate in any meetings subsequent to January 1, 1971 and before the closing of February 11th?

A Meetings not at Finley, Kumble.

Q Correct.

A My present recollection is that I attended at least two meetings, I believe one was in Mr. Steefel's office at Stroock & Stroock & Levan, and one was at the office of Golenbock & Barell.

Q Could you fix those times? Take the Steefel meeting. When was that held?

A They were both held, to the best of my recollection, around the middle of January.

Q At either of those meetings did Mr. Mandel appear and attend on behalf of Mr. Gross?

I beg your pardon on behalf of Bleich and Donoghue.

A I believe, though I am not sure, that Mr. Mandel was present at the meeting at Golenbock & Barell. I do not know in what capacity he appeared.

Q At sometime or other, did you learn that Mr. Mandel, in the month of January, was asserting that the transaction could not be consummated without the signatures of the people whom he represented, namely, the limited partners Bleich and Donoghue?

A Yes.

Q Were you also aware of certain demands that were being made by Charles Gross?

A Yes.

Q Did you participate as a negotiator in dealing with those problems?

A As a negotiator, no.

Q Were you there with Mr. Persky while he negotiated with Mr. Mandel?

A My recollection is that the Golenbock & Barell meeting dealt with Mr. Gross' demands, and I possibly the meeting at Mr. Steefel's office did as well, but I am not sure.

Q At the Golenbock & Barell office, was that a small meeting?

A No, it was a fairly large meeting. Most of our meetings were fairly large meetings.

Q At the Golenbock & Barell office?

A Most of our meetings with respect to this transaction given the number of people involved; my recollection is that the meeting at Golenbock & Barell involved a fairly substantial number of people.

Q All right, very well.

Was the Golenbock & Barell meeting the last meeting that you recall having attended prior to February

11, 1971?

A I am not sure whether that followed or--

Q Preceded?

A -- or preceded the Stroock & Stroock & Levan meeting.

Q All right. By the provisions of the December 31st agreement, was it contemplated that an opinion letter would be dleivered at the closing of February 11th?

A It was contemplated that two opinion letters would be.

Q Two opinion letters?

A Yes.

Q Which two opinion letters do you refer to, Mr. Bamberger?

A One opinion was to be delivered by counsel for the transferee and one opinion letter by counsel for the transferer, to the best of my recollection.

Q Who was to represent the transferer?

A Rosenman -- I don't know the full name of the firm. The Rosenman firm.

Q Rosenman, Colin, Kaye, Petschek, Freund & Emil?

A Yes.

Q In the period of time subsequent to December 31st and up to February 11th, did you have any dealings with a lawyer from the Rosenman firm concerning the opinion letter which it was anticipated the Rosenman firm would deliver at the closing on behalf of the transferer?

A Yes.

Q Who in that firm was the lawyer or who were the lawyers in that firm with whom you dealt?

A The lawyer with whom I personally dealt was Paul Burak.

Q Mr. Burak has testified in this case that he was assisted by certain juniors in his firm, one of whom I think was named Friedman. Did you have any dealings with Friedman?

A Not to the best of my recollection.

Q To the best of your recollection, sometime in the latter part of January 1971, did Mr. Burak deliver to you a memorandum which had been drafted in his office by Mr. Friedman concerning any problems involved with the proposed transfer agreement?

A No.

Q At any time before the closing did you or anybody else in Finley, Kumble, receive a Rosenman firm memorandum dealing with the problems of Section 98 of the Partnership Law?

A I never received it, and to the best of my knowledge, no one else received it.

Q Mr. Bamberger, do you recall whether or not the subject of Section 98 and its applicability to the proposed transaction was ever the subject of discussion between you and Mr. Burak?

A Yes, it was.

Q Would you tell Judge Owen when you recall the first time that that subject matter was first raised between you and Mr. Burak?

A The first time would probably be in the early or middle part of January, when Mr. Burak said that on a quick look he had found no cases directly in point with respect to 98, and that therefore he was having research done on the matter.

Q When he first mentioned that to you, did he give you any indication of whether or not in the absence of finding immediate precedent he was anticipating any problem?

A No.

Q As time went along, did you continue to speak with Mr. Burak about Section 97 and other matters?

A I spoke with Mr. Burak rather frequently, on all aspects of the documentation. Mr. Bureak called me on occasion. Mr. Burak also called Mr. Persky on occasion, and Mr. Persky would generally just have his secretary take a message and have me return the calls since Mr. -- the conversations with Mr. Burak were generally lengthy.

Q In the interchange of these communications with Mr. Burak, was there only one subject matter, namely Section 98, that was discussed, or was there a broad spectrum of matters discussed between you and him?

A There were a multitude of matters.

Q In the mutltitude of these matters affecting the proposed transaction, how prominent was the Section 98 matter in the course of the discussions beginning in January through the end of that month?

A That was one of a series of problems that we discussed in terms of the closing.

Q Did you have any indication from Mr. Burak before the end of the month of January that he was having difficulty with Section 98?

A At some time in the latter part of January, Mr. Burak and I had a somewhat more lengthy discussion about Section 98 where Mr. Burak said that they had done some research and that they were still having trouble giving the opinion; and we discussed Section 98 and its purpose and its applicability to this transaction, and -- and I said I would have some people look and see whether we could find some cases that they couldn't find, and try to be helpful.

Q Did Mr. Burak tell you before the end of the month of January that the difficulty which he was having with Section 98 was such that his firm would refuse to give the opinion letter?

A No.

MR. MANDEL: I object to leading questions.

THE COURT: Yes, sustained.

MR. GRUTMAN: Very well, I withdraw the question.

Q When Mr. Burak said he was having difficulty, was that all that he said?

A I believe my word was that he was having trouble.

Q All right, trouble. Was he having trouble with other matters besides Section 98 during this period of time?

A Yes, there were -- one of the big problems that we were discussing, he was concerned about there were assignments of tax refunds, and he was -- his firm was concerned about how that would work mechanically. We spent a great deal of time on that.

Q Of the problems that you had, which problem seemed to get the most attention? And when I say you, that is plural.

A The problem that got most attention was trying to get everything finished and everything straightened out by the date that we had to close to a void problems with the New York Stock Exchange.

Q As you were coming down to the deadline of February 11th, on the basis [illegible] the conversations that you had with Mr. Burak, did any of these many or multitudinous problems that you had been discussing seem insoluble?

A No.

Q Did Mr. Burak give you an indication that he felt that any one or several of them were insoluable?

MR. MANDEL: I object to leading questions.

THE COURT: Yes, sustained.

MR. GRUTMAN: I am following the discussion that he was having trouble. I am trying to find out how the trouble was being dealt with.

MR. MANDEL: Mr. Grutman is testifying. I have let it go on for a long time. It is not proper.

THE COURT: Objection sustained.

Q As you continued to deal with the problems, Mr. Bamberger, what results were you getting about resolving them?

A We were basically working out the problems one by one.

Q As you came down to the closing, was there any problem which had not yet been resolved?

A Not to the best of my knowledge. There were many things that had to be done on the closing date, and there were documents that I had not seen and reviewed and so on which again is why the closing took a period of time.

Q Did that include the opinion letter that the Rosenman firm would give?

A Yes.

Q Did you anticipate before the closing that his opinion letter would not be given by the Rosenman firm?

MR. MANDEL: I object.

A No.

THE COURT: No, overruled.

A No.

Q After Mr. Burak first mentioned to you that his firm was having some trouble with the Section 98 issue, did you arrange for any research to be done either by yourself or anybody else at Finley, Kumble to look into the question of what authorities or teaching there was in the corpus juris on the Section 98 issue?

A Yes.

Q Who was it who did the work?

A The work was done by a number of people. I had a young associate, whose name I do not recall at this time, go to the public library.

Q Public library?

A Not public library, pardon me, the library of the Association of the Bar of the City of New York, and look into the question generally. I did some research in the materials available at the library of Finley, Kumble. I discussed what we had found with Mr. Persky. I discussed what we had found with Mr. Gelb. And that is basically the -- and I believe Mr. Persky.

THE COURT: Mr. Bamberger, what did you find?

MR. GRUTMAN: That was the next question.

Q What did you find, tell us?

THE COURT: What did you find? Tell us. So we know what you discussed.

THE WITNESS: Sorry.

A What we found -- the case that we found closest in point was an old Pennsylvania case, the name of which I do not recollect at this moment, decided in the late 19th Century which had said basically that in an assignment to creditors situation, not applying a predecessor statute, since the Unionism Act was not then in law, that the consent of the limited partners was not required.

We also found New York cases which said, one of which I believe is called Mist Properties, I believe --

Q Yes, correct.

A -- which implied or which probably held that Section 98, that the requirement of Section 98 was not an absolute requirement, but could be waived either by action of the parties or perhaps by the facts, that it was not an absolute bar.

And we believed, or put it personally, I believed and as a matter of fact I still do believe, that reading Section 98, which talks about the general partners cannot do anything to make it impossible for the limited partnership to carry on its ordinary business, we applied to the facts of this case, namely, were withdrawn limited partners, number one and number two a partnership which by its terms would have no going bills unless something was done within a matter of hours, that Section 98 did not bar the transaction.

Q Was that your good-faith conclusion of what the law held?

A That still is my good-faith conclusion about what the law holds.

Q Mr. Bamberger, were you aware of the provisions in the partnership agreement of Newburger, Loeb in 1970 which vested the executive committee with the right to run the business and bind both the partners, general and limited as well?

MR. MANDEL: I object.

THE COURT: Let me hear that back, please.

MR. GRUTMAN: The question, I will rephrase the question.

Q Mr. Bamberger, had you seen the partnership of Newburger, Loeb?

A Yes.

Q Do you know whether or not under that partnership agreement there was an executive committee?

A Yes, there was.

Q What were the powers conferred upon the executive committee by the partnership agreement as you understood it?

A Very broad.

Q Including what?

A To run the business of the partnership.

Q To bind the general partners?

A And to bind the general partners.

Q How about the limited partners? Could they do that?

A The limited partners in a limited partnership generally have no say in the business of the partnership.

Q In coming to the conclusion which you did concerning Section 98 its impact or non-impact on the projected transfer agreement, did you know whether or not the executive committee of Newburger, Loeb, the partnership, had voted on the proposed transfer agreement?

A To the best of my knowledge the executive committee had voted in favor of the transaction.

Q Was that something that you took into account in reaching the conclusion which you did concerning the non-baribility of the transaction by the refusal of two withdrawn limited partners to agree to the transfer agreement under Section 98?

A Yes, though we didn't need it because all of the general partners had consented as well.

THE COURT: Mr. Bamberger, just so I understand you, you are saying that the executive committee of Newburger, Loeb had the power to set aside the provisions of 98, assuming they were to the contrary.

THE WITNESS: No, sir.

THE COURT: What are you saying?

THE WITNESS: What I am saying is there are two steps. We don't really need the executive committee because in this case all of the general partners, all of the then general partners took this act. The question then becomes whether the vote of the limited partners is required, as you well know, in a limited partnership, basically limited partners under the law as it now stands have no business with the business of the partnership, and to the extent that they get involved with the business of the limited partnership, they possibly pick up the liability of a general partner.

Now in a certain very limited set of factual situations, Section 98 said that despite the general rule, that limited partners do not take part in the business of the partnership, that in certain situations limited partners will have a vote, on that the written consent of all of the limited partners must be obtained and it does not have to be by a vote.

So one of those is where the general partners take an act which makes it impossible for the partnership to carry on its business.

Now the reason for that is that limited partners have put their money at stake, and they put their money at stake in a going business; and they have nothing to say about that going business, but the least they should be entitled to is that the general partners do nothing to terminate that going business; and that I believe is what Section 98, 1-C I believe, but I am not sure, was meant to cover.

THE COURT: How does the executive committee get into this?

THE WITNESS: The executive committee really -- the executive committee is not necessary here because all of the general partners consented. They could have short-circuited by just having the general partners' consent. Let me just say --

THE COURT: I see what you are saying. All right. Go ahead, Mr. Grutman.

Q Is there something else that you wanted to add, Mr. Bamberger, to complete the answer you were giving to Judge Owen?

A Yes, let me just say one more thing.

On the proposed new Limited Partnership Act, uniform, the modification of the uniform Limited Partnership Act, partly because of decisions like that of Judge Ward which read 98 very, very strictly, and permits one limited partner to hold up a whole operation, and which probably -- which I believe and which the revisors believe was not the intent of 98 -- that whole section has been turned around, so that now it just says that the limited partnership agreement may require the vote of all or a given percentage of limited partners in various circumstances as set forth in the limited partnership agreement. It turns the whole burden around the other way.

Q Does that include as to the termination of the business?

A Yes.

Q Mr. Bamberger, when you were coming to the conclusion which you did concerning the then state of --

THE COURT: Mr. Bamberger, let me ask you this:

If Section 98 is to be read the way you contend it should be, is there a need to change the language to achieve the flexibility that you seem to feel is required?

THE WITNESS: No, but unfortunately as things stand now, the only recent definitive decision in point is Judge Ward's.

THE COURT: And potentially mine; is that right?

THE WITNESS: And potentially yours.

MR. SHAW: I like the word potentially, your Honor.

THE COURT: I have announced that that is how I am going to rule, so that is why I put it that way.

Q Mr. Bamberger, under the then existing verbal formulation of Section 98, and what you understood it to be, did you know whether or not the Uniform Partnership Law which was enacted into the corpus juris of New York, was intended to be strictly construed or was a remedial statute or what? What did the statute say?

A The statute has a provision that says that despite the general rule that statutes in derogation of the common law are to be read strictly, that this statute -- that the Uniform Act is to be read liberally in light of its purpose.

Q Had you ever been familiar with any decisions by the Second Circuit, particularly a decision by Judge Friendly in the Klebanou case, interpreting the Partnership Law of the State of New York.

Had you come across that in your research?

A Did I then?

Q Yes.

A I do not recall one way or the other.

Q Whether you recall that case or not, you understood it was to be liberally construed?

A Yes.

Q And that was whether it favored your side or another client, that was the intent of the Legislature, is that what you say?

A Yes.

Q When you came to the view which you did concerning 98, did you communicate it to Mr. Burak?

A Yes.

Q How long before the February 11th closing did you bring hom to Mr. Burak the yield of the research that had been done by you and others in the Finley, Kumble firm on this problem?

A To the best of my recollection, in the latter part of July -- in the latter part of January.

Q When you made it known to Mr. Burak, as to what your views were, what did he say to you?

A We discussed them at length and we discussed the meanings of the cases and how it went, and Mr. Burak said that he would look into it further.

Q Is that all that he said up until the closing?

A Yes.

Q Had you had any intimation from Mr. Burak as to what he would do after he had "Looked into it further" before you came to the actual closing itself on February 11th?

A No.

Q Do you have a recollection, Mr. Bamberger, of having participated in the closing itself?

A Yes.

Q That is February 11th?

THE COURT: Right.

A There was a two-step closing to my recollection, there was a pre-closing on the evening of the 10th, I believe, and then it went on throughout the day on the 11th.

THE COURT: Mr. Grutman, let's take our break at this point.

MR. GRUTMAN: Yes, Judge.

(Recess.)

(In open court, after recess.)

MR. GRUTMAN: Shall I proceed, Judge?

THE COURT: Yes.

BY MR. GRUTMAN:

Q Mr. Bamberger, at the recess I was talking with you about the events of the night of February 11th. I would like to borrow a locution from Mr. Mandel and go back a little in time to on or about February 8, 1971.

Had you been advised on or about that period of time concerning the position advocated by Mr. Mandel on behalf of Bleich and Donoghue?

A I had known that Mr. Mandel was taking a position, again without knowing on whose behalf, that he was going to enjoin the transaction if it took place; or if the closing were attempted, that he would enjoin the consummation of the closing.

Q I show you a document which has been marked Finley, Kumble Exhibit HH for identification which appears to be a letter of February 8, 1971, addressed to the

Honorable Vincent A. Lupiano, Justice of the Supreme Court of the State of New York.

Do you recognize the document, Exhibit HH for identification to be a photocopy of a letter which you sent on that date to Judge Lupiano?

A Yes.

Q At the time that you sent the letter was Judge Lupiano the Judge then presiding in that part of the New York State Supreme Court in New York County which dealt with the granting of ex parte applications for temporary restraining orders?

A Yes.

Q And did you send that letter as part of your regular work as an attorney at Finley, Kumble?

A Yes.

Q And has the letter been kept by Finley, Kumble as a regular part of its customary business records?

A Yes, that is a Xerox of the carbon copy.

MR. GRUTMAN: I offer the document in evidence.

MR. SHAW: No objection.

(Defendant Finley, Kumble Exhibit HH received in evidence.) xx

MR. GRUTMAN: I ask Mr. Mandel to concede that no application for a temporary restraining order was ever made.

THE COURT: Isn't a record established on that already?

MR. SHAW: I think it is, your Honor.

MR. GRUTMAN: Let it be at this place in the record so it is clear.

Q Mr. Bamberger, did you understand that at the time the discussion was had about an attempt to enjoin the proposed transaction, the ground to enjoin the transaction -- what the ground of enjoining it would be predicated upon?

MR. MANDEL: I object, your Honor, because there has been no foundation laid. I let Mr. Bamberger say he understood or concurred or this or that without a foundation, and now he is going further.

MR. GRUTMAN: No, your Honor, may I be heard a moment?

THE COURT: There is no foundation of an attempt to enjoin.

MR. GRUTMAN: The point that I am trying to get to is this: In the same sense that Mr. Mandel has seized upon things that were done in briefs and the like, I think that it is germane to understand on the issue of good faith that Mr. Mandel was advocating Section 98 as a bar to the transaction; and that Finley, Kumble was prepared in good faith in the event that Mr. Mandel sought to enjoin it, to go down before a Judge of the Supreme Court and in Part II, maintain on the proposition of law that we squarely presented.

THE COURT: You have your letter in evidence.

MR. GRUTMAN: That only says -- well, all right, but I want the letter to be clear that it was Section 98 that Mr. Mandel was talking about and that we were prepared to --

THE COURT: I think the record shows --

MR. MANDEL: I would like the record to be clear that I don't object to Mr. Bamberger's testimony about anything he knows about first-hand. What he has been sliding in here, I believe, through leading questions without foundation, is he heard or he understood or this or that.

Now if Mr. Bamberger will testify as to hearing me say something at a time and place, that would be proper.

MR. GRUTMAN: I think however he should be permitted --

THE COURT: Let's not go on with this. Let's go on with the next question.

MR. GRUTMAN: In a conspiracy case? All right.

Q Mr. Bamberger, at the time you wrote the letter to Judge Lupiano on February 8th, with what provision of the Partnership Law, if any, were you prepared to contend in going down to Special II?

A Section 98.

Q And did you understand that if an injunction application had been made predicated upon the Section 98 impact to the transaction, that would have squarely tested as a matter of law in the New York State forum the question of whether you were right in your interpretation of Section 98?

A Yes.

Q And were you prepared in good faith to go down and take that position if the ex parte application for a temporary restraining order had been sought?

A Yes.

Q Did you have any contact with Mr. Mandel between February 8th, when you wrote the letter to Judge Lupiano and February 11th?

A No.

Q On February 11th, at what time did the closing at the Finley, Kumble office begin?

A On the 11th it began fairly early in the morning to the best of my recollection.

Q And how long did it last?

A It ran through -- it ran through most of the day.

Q Did it extend into the night?

A Not to the best of my knowledge.

Q Did it begin on the 10th or on the 11th?

A I believe it began the night of the 10th and concluded the day of the 11th, but I am not --

Q Non-stop?

A No, sir.

Q You mean there was a stop or there was no stop?

A There was a stop.

Q At what time?

A The preliminary review of documents and -- there was a preliminary review of documents in the evening of the 10th, and then a -- and then all of the parties got together -- all of the necessary parties got together on the morning of the 11th.

Q And the matter was wound up and the last document executed and delivered at what time on the 11th?

A I have no clear recollection. I believe in the afternoon.

Q You have just said that there was a preliminary review of documents on the evening of the 10th; is that right?

A Yes.

Q When was it that Mr. Burak announced that the Rosenman firm would demur in supplying the opinion letter that you thought they would deliver?

A To the best of my recollection, the morning of the 11th.

Q Had Mr. Burak said anything about that on the 10th?

Withdrawn, that is a leading question.

What if anything had been said about the opinion letter on the 10th?

A I do not believe we discussed the opinion letter on the 10th because the first time the opinion letter was brought up at the closing date was when Paul Burak said to me that the Rosenman firm could not deliver one.

Q When did Burak tell you that?

A I believe it was the morning of the 11th, but I know it was sometime either the evening of the 10th or the morning of the 11th.

Q Whether it was the evening of the 10th or the morning of the 11th, had Burak ever told you that he would not deliver the opinion letter before the earlier of those two dates?

A No, in fact it came as quite a shock to me.

Q When the announcement was made, where was it made by Mr. Burak?

A I believe it was made in the library at Finley, Kumble which then had a very large table which we used as -- for large closings.

Q As you search your recollection, Mr. Bamberger, which of the two dates that you suggested seems the more likely time that he mentioned it?

THE COURT: No, no, sustained. What is your best recollection.

Q What is your best recollection, that is, as between the two dates when you told us it could have happened, which seems the more likely?

Is that an admissible question?

THE COURT: Well, the problem is, as I understand it, you said it could have happened either the evening of the 10th or the morning of the 11th. That is your testimony, right?

MR. GRUTMAN: Right.

THE WITNESS: Right.

THE COURT: What is your recollection on that subject?

THE WITNESS: My best recollection is that it happened during the daytime; which would mean the morning of the 11th.

Q Tell us what occurred. Describe it as you recall it.

A Mr. Burak and I were going over various documents required for the closing, which were voluminous; and putting them into various piles for the proper people to sign and making sure that we had signed copies, appropriate documents, and I had a checklist which I usually do for closings so that I do not miss any documents, and we got to, on my checklist, to the opinion letter, and Paul Burak said that the Rosenman firm couldn't give it.

And I told him in substance that I was shocked, and surprised, because he hadn't told us before and we had got all these people together and without being able to consider the situation and he in effect said, "Well, we can't give the opinion."

I then communicated that fact to Mr. Persky, and that fact was communicated by Mr. Persky and/or myself to the various persons at the meeting.

Q How many sets of lawyers do you recollect were at the meeting?

A There must have been 10 or 11 lawyers there, minimum. I mean 10, 11 firms.

Q Sets of lawyers?

A Firms represented because there were three lawyers from Finley, Kumble alone.

And a discussion followed as to what would happen. Now, there were various things that could have happened, and that were discussed. One was that the corporation could have waived the opinion --

MR. MANDEL: Excuse me. May we have the discussion as a discussion?

MR. GRUTMAN: This is the discussion.

MR. SHAW: This is the discussion.

MR. MANDEL: With whom?

A The discussion was a discussion involving Messrs. Persky, Bamberger, Burak, whoever was there representing -- I don't know whether it was Mr. Lewis or Mr. Bialkin.

Q Mr. Lewis, it has been testified, was present on behalf of the Dworkin clients on behalf of Willkie, Farr.

A And then there were basically the lawyers in the room were -- got together, and discussed what should be done, and among the items that were discussed were that the corporation could waive the opinion, since the opinion, was for the benefit of the corporation.

Q Stop a moment please, Mr. Bamberger.

MR. GRUTMAN: What is the exhibit number for the transfer agreement? I want the actual exhibit wo I can hand it to the Court.

Your Honor, I would like to hand up to the Court Exhibit 24, which is the transfer agreement, and ask the Court respectfully to examine the provisions of Section 6(d) which I would like to read into the record, appearing at page 6 of Exhibit 24, under the general caption of "Conditions Precedent to Transferees' Obligations."

Paragraph D reads: (Mr. Grutman read from the exhibit.)

Q Is that the provision of the agreement, Mr. Bamberger, which relates to the so-called Rosenman firm opinion letter?

A Yes, sir.

Q As you understood the agreement, for whose benefit was the opinion letter to be supplied?

A That was for the benefit of the corporation so that they knew that they were getting what they were paying for.

Q In light of that understanding, you say there was some consideration given after the Burak announcement of his unwillingness to supply the opinion, of waiving the opinion letter referred to in Section 6(d); is that correct?

A Yes. May I see that? My recollection is that generally provides that things can be waived.

Q There is 6(d)?

A Right, and it provides at the beginning of 6, that "It shall be subject to the satisfaction proviso thereto of the following conditions unless specifically waived in writing by the transferee," which is the corporation.

So that was --

Q You were the careful draftsman who provided that language. Tell us, when the subject of possibly waiving the opinion letter was first raised, what then ensued in the discussion among the people that you were telling us about?

A Well, there was then a question whether it should be waived; and someone asked, "Well, has anybody else done research in this area?"

And I believe Mr. Persky or myself, I do not know who, said that we had done research, and we were asked what our view of the law was, whether we agreed with Rosenman, though Rosenman did not take the -- Mr. Burak did not take the position at that time that the law was that the transaction could not be carried through.

Rather, he took the position that the Rosenman firm was not willing to give an opinion that proper authorization had been carried out.

And Mr. Persky I believe stated the view which I expressed earlier here, that we -- that Finley, Kumble believed that Section 98 under these facts did not bar the transaction, and then I believe -- I am not sure who -- I believe Mr. Risher said that they would feel more comfortable with having an opinion though they could waive it within solely, and asked Mr. Persky whether he could give a written opinion. And Mr. Persky --

MR. MANDEL: I missed this. Was that Mr. Risher?

MR. GRUTMAN: That is what he said.

A I believe it was Mr. Risher, though I am not sure.

And Mr. Persky, to the best of my recollection, said that he would try to see what he could draft and then I believe he went -- Mr. Persky went into his room, possibly with Mr. Risher, and Mr. Muh, and/or Kayne, and discussed it, and then subsequently Mr. Persky prepared a draft which I looked at, and which was subsequently read to the assembly, and which became the document which is -- which was signed and is in the binder.

Q Mr. Bamberger, when you reached the place in the process of the closing where Burak first announced the unwillingness of the Rosenman firm to render the opinion, what happened to the closing itself?

A It ground to a halt, and it became so chaotic because we had a lot of people there, and we had people sitting in different -- clients sitting in different rooms while the lawyers remained in the central room, basically, so people went to talk to their clients about what had happened and so on.

Q While Mr. Persky was in his own office drafting the opinion letter, did things resume or did things stay at a halt until the Persky opinion letter was circulated and approved?

A Things resumed. Mr. --

Q You mean they resumed before the opinion letter?

A Yes, Mr. Rosenblum and I continued working with the other counsel in preparing the documents.

Q That is documents other than the opinion letter, is that correct?

A Yes.

Q So when you told his Honor that things ground to a halt, was that only for informational purposes to be conveyed to the parties?

A They ground to a halt so that there could be a discussion of this problem, which was one of a series of problems that we ran into at the closing, which is why it took as long as it took.

Q Then were there other instances in the closing where halts or stopping places occurred until problems were ironed out?

A Yes.

Q Did other problems come as a shock to you?

A No, sir, that was really the only one that came as a shock. I had had correspondence with Mr. Burak, I believe, where he had written and said that certain items that we had to develop, and I had correspondence and there were problems about getting documents. I remember Ned Frank,and I believe it was for the closing rather than the December thing, flew down to Brazil to get certain documents signed by people down in Brazil and it was a question whether he could get back in time.

There was a lot of--and once again we were under the time pressure from the New York Stock Exchange which had established a new deadline.

THE COURT: Well, Mr. Bamberger, is this Clause 6(d) which Mr. Grutman has placed before me, which you were considering that night, that is a clause in which the seller is required to give to the buyer, in this case, a statement that the seller has the "Power and authority" to do?

THE WITNESS: Do the transaction.

THE COURT: Now, that is no small matter, and the lawyer for the seller says, "I am not going to give you a letter that I have power and authority to do it."

That is not a small matter, is it?

THE WITNESS: No, sir.

THE COURT: And it was not a small matter that night?

THE WITNESS: That morning.

THE COURT: That morning?

THE WITNESS: No, sir.

THE COURT: Because the seller's letter says, "I can't do this." The seller's lawyer says, "I am not going to say to you I can do this."

THE WITNESS: Right, "I'm not going to give you my legal opinion."

THE COURT: "My legal opinion saying that we can do it."

That means that you are on notice that in their view they are unwilling to say it can be done.

THE COURT: Is that right?

THE WITNESS: That we were on notice or that all the parties were on notice that the Rosenman firm felt that it could not give a legal opinion that it could be done.

THE COURT: That it could be done?

THE WITNESS: Yes, sir, and that's why it came as a great shock to all the people.

I must say I don't think even the Rosenman firm's clients knew until that time that we would run into this problem.

MR. MANDEL: Excuse me, I missed that.

MR. GRUTMAN: "I don't believe that the Rosenman firm's clients knew."

MR. MANDEL: There has to be a foundation for that since it contradicts the testimony.

MR. GRUTMAN: I disagree with that.

THE WITNESS: I was just about to say why.

MR. GRUTMAN: Please tell us why.

MR. MANDEL: No.

MR. SHAW: Or what happened in his presence.

THE COURT: Wait a minute, gentlemen. Wait a minute. I am asking questions here, and --

MR. SHAW: I am sorry, your Honor.

MR. GRUTMAN: Forgive me, your Honor. I didn't mean to preempt.

THE COURT: The ball is in my court.

MR. GRUTMAN: I will sit down.

THE COURT: Did you ask Mr. Burak, "Why didn't you tell me about this last night?"

THE WITNESS: Yes. Sure. I said "Why didn't you tell me before?"

THE COURT: What did he say to you?

THE WITNESS: He said -- I got the impression from Mr. Burak that the final decision not to give an opinion had not been made until just before the closing.

THE COURT: What is your best recollection of what was said that gave you that impression?

THE WITNESS: Your Honor, I do not recollect what specifically was said but that is my best recollection of the view that I got from what Mr. Burak said to me.

THE COURT: Did you argue with him at all?

THE WITNESS: Yes; and I -- we discussed it again. I pointed out the various legal points that I described and Mr. Burak said that it was out of his hands.

THE COURT: Is that all he said?

THE WITNESS: Yes, and he was the only one there.

THE COURT: Did you say, "What do you mean it is out of your hands? This is holding up the whole deal ?

Who can you call?"

Anything like that?

THE WITNESS: Your Honor, there was a lot of discussion, and the specifics of which are not within my recollection. I do recall that it created a great ruckus at the time, two-fold. Number one, because the fact of not being able to give the opinion; and number two, the timing of all of the various parties discovering that they could not give the opinion; and I mean the fact that a firm cannot give an opinion about something is not by itself totally unusual. I had a closing last week with Manufacturers Hanover on a bank loan which involved a series of guarantees where the loan agreement required that we give an opinion that all the guarantees were valid with full power because one happened to be a California public utility we couldn't give that opinion for that company because there were possible problems. They said, "Okay, we will take the guarantee without the opinion and waive it."

So that by itself is not that unusual.

But given the type of opinion they couldn't give and given particularly the timing of it --

THE COURT: You mean the type of opinion meaning going to the validity of the whole transaction?

THE WITNESS: Yes, though my opinion on the question of whether the California subsidiary can validly give it here a guarantee goes to the guts of that guarantee.

THE COURT: You say that the Newburger, Loeb Corporation, there was discussion about it waiving it because it was for its benefit?

THE WITNESS: Right.

THE COURT: Was there a discussion among others who were being asked to sign this transfer agreement that this was to some degree for their benefit as well because the others are going along substituting paper for prior ownership positions in a partnership, they want to know that they are coming into something that is going to hold up.

THE WITNESS: Certainly.

THE COURT: Right.

THE WITNESS: And while technically legal the corporation could have waived it and the other parties to the transaction could not complain, because that is the way the document --

THE COURT: Then they didn't have to go along with it?

THE WITNESS: Well, they were -- right, they didn't have to go along though there was an agreement which said that if certain things happen, that they had to close, as a practical matter, one of the -- the agreement, the Finley, Kumble opinion was given -- badly put. Let me turn it around.

There was a discussion among all the counsel with respect to Section 98, as I said, when this thing came up, and the question, part of the discussion of whether or not to waive was is Rosenman not giving the opinion only because they are being very conservative and very sticky and saying, "We are not going to give an opinion unless we find a case directly in point," or are they refusing to give the opinion because they think that this is a wrong thing to do?

The impression -- the discussion among counsel was, and we expressed our view, or the view I expressed to you previously, and counsel generally agreed with our view, but said that they would feel more comfortable if they saw it in the form of an opinion of counsel if we felt we could give one; and that is more or less filling in the area, and then Mr. Persky went off to draft what he felt would be an appropriate opinion.

THE COURT: Was there any risk that people who had said that they would go along with the new people who had said that they would go along with the new organization, whether it was partners who agreed to take certain preferred stock and limited partners who agreed to take paper of some kind, subordinated lenders and so on, was there any risk that they might have backed away if there had been no opinion that it was a lawful transfer?

THE WITNESS: That is guessing at motives of people.

THE COURT: Was there any discussion of that?

THE WITNESS: No.

THE COURT: People said --

THE WITNESS: Not that I can recall.

THE COURT: Not that you can recall?

THE WITNESS: Let me just say most of the parties felt very strongly by that time that given the choice of liquidation and suspension or moving ahead this way, that this was a necessary step for the business to take, that there really was no choice.

THE COURT: And that there really should be an opinion from someone?

THE WITNESS: Well, that is really separate and apart from the opinion but that there should be a consumpation of this transaction and people were working towards the consummation, the lenders and the limited partnersand general partners.

THE COURT: I see. All right. Go ahead, Mr. Grutman.

BY MR. GRUTMAN:

Q Mr. Bamberger, if the transaction had not been consummated on February 11th, what would have happened to Newburger, Loeb?

A The New York Stock Exchange had said that once again that the next business day the firm would be suspended and that they would move towards liquidation of the firm.

Q Had you considered, in the event that the opinion letter which you gave and the view which you held was in error, what would have been the remedy for the dissident withdrawn limited partners?

MR. MANDEL: Excuse me, there were no withdrawn limited partners. Not only is Mr. Grutman leading, he is misleading.

MR. GRUTMAN: No, I think, your Honor, that we have in evidence introduced by Mr. Mandel letters of withdrawal by Miss Bleich and Mrs. Donoghue which had been served on the corporation prior to February 11th.

MR. SHAW: December 31st, to be exact.

MR. GRUTMAN: After Miss Bleich signed the agreement she then withdrew, and so did Mrs. Donoghue.

THE COURT: Why don't you phrase it differently and say did he give any thought to what happened if Bleich and Donoghue didn't go along, without characterizing it.

MR. GRUTMAN: I will take it that way.

Q Did you hear his Honor's question? What would the remedy be if Bleich and Donoghue didn't go along?

THE COURT: Had you given any thought to what the remedy would be?

THE WITNESS: Yes.

Q What was the answer, Mr. Bamberger?

THE COURT: What it was thought you had given, Mr. Bamberger.

THE WITNESS: That if the transfer were not effected, that they would have the right to an accounting or the right to receive the monies that were properly due to them, since they -- whatever those monies were; since their right against the partnership was a money claim, and in fact the agreement specifically provides that that money claim is, is to be assumed by the corporation.

Q And that would be so, as to what their right would be, whether the transfer were effective or otherwise, correct, Mr. Bamberger?

A That it was a money claim, yes, sir.

Q And these views that you have expressed as to what you believed on February 11th, as you have answered my questions and Judge Owen's questions, were those views which you held in good faith?

A Yes, sir.

Q And were they opinions that you reached exercising the experience, the knowledge, and the talent that you have?

A Yes, sir.

MR. GRUTMAN: No further questions.

MR. SHAW: I just have one or two points.

CROSS EXAMINATION

BY MR. SHAW:

Q You talked about conversations that you had with Mr. Burak as early as January 15th running through to the meeting on February 10th; and I ask you this question:

As of January 15th, when you first began discussing this question with Mr. Burak, did you know that you had a real problem as to whether or not the consent of certain limited partners or certain persons would not be given?

A We knew there was a real possibility.

Q And that was as of January 15th?

A Or -- yes, or we believed there was a real possibility based on what Mr. Mandel and Mr. Silverman had been saying.

Q Weren't there any negotiations after January 15th with Mr. Mandel that you were aware of?

A Yes.

Q In fact --

A I don't know whether they were with Mr. Mandel personally but they were with representatives of Bleich and Donoghue.

Q Weren't there in fact negotiations up through February 5th?

A I don't know the exact date. There were negotiations up to just a few days before the closing.

Q Did there come a time when, instead of there being a real possibility, it was definite that there would not be the consents of certain limited partners? In other words did this possibility become definite?

A It is very hard to know when a threat which has been given over a period of time, becomes a definite threat as opposed to just a threat.

Q But did that occur? In other words, did the possibility become definite over a period of time?

A Well, by the closing -- on the closing, or -- and probably a day or two before we were fairly well-convinced that Miss Bleich and Mrs. Donoghue would not sign.

Q Just one further question:

You discussed the question of injunction being mentioned, and you testified that you sent a letter to the Court, which I believe asks in substance for you to be advised if an application for a temporary restraining order was made.

Did you communicate with Mr. Risher or persons connected with the corporation the fact that no injunction had in fact been requested, no temporary restraining order had in fact been requested by Mr. Mandel in behalf of any person?

A We called the morning of the closing, we called Special Term Part II, because sometimes your letters get lost; and were told that nothing had been filed.

I communicated to the group in general, I do not know whether I communicated to Mr. Risher in particular.

MR. SHAW: No further questions.

CROSS EXAMINATION

BY MR. MOSS:

Q Mr. Bamberger, who were Mr. Burak's clients at the closing?

A Mr. Burak's client, he had -- he was counsel for the corporation -- pardon me -- counsel for the partnership and I believe he represented one or both of the Newburgers.

Q Was that Andrew Newburger and Robert Newburger?

A Yes, sir.

Q Was Mr. Robert Stern present or Richard Stern?

A I could tell by looking at the list.

Q Will you do that, please?

(Witness referred to a volume.)

A Mr. Andrew, it shows here that Andrew Newburger, Robert Newburger and Robert L. Stern were there representing the partnership and listed as their counsel was Mr. Burak.

Q Did they sign the transfer agreement?

A Yes, they did.

Q Was Mr. Burak present when they signed?

A Yes.

MR. MOSS: Thank you.

THE COURT: Mr. Mandel.

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CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Bamberger, when did you first become aware that Kayne and Muh and Risher and perhaps some others were working on plans to acquire the Newburger loan business?

A That is a hard question to answer, Mr. Mandel because it didn't happen like that. It was the evolution of a series of events.

Q When did you hear the first suggestion that Kayne or Muh or Risher or some combination might acquire control of the business?

A Sometime during the latter part of the fall of '70.

Q By that you mean what month?

A I would think there was a possibility the possibility began to be discussed in November but I am not sure.

Q Mr. Bamberger, didn't you form a corporation for them in October?

A For them personally? No, sir.

Q Did you form a new corporation in October with the name Newburger, Loeb?

A Yes, sir.

Q For whom?

A For the partnership.

Q Ho instructed you to do that in behalf of the partnership?

A I do not know.

Q You don't know?

A Yes, sir.

I do not recall at this time.

Q Did you get that instruction from any partner or from Mr. Persky?

A I really do not recollect how it got it.

Would you like to know why the corporation was formed?

THE COURT: Mr. Bamberger, just answer responsively to questions that are put to you.

MR. MANDEL: I'm sorry.

MR. GRUTMAN: He asked if you would like to know why it was formed.

Q Yes, please tell me.

THE COURT: All right.

A The discussions I believe had commenced with the New York Stock Exchange about the financial and net capital problems of Newburger, loeb; and one of them, one of the possibilities --

Q Speak up a little bit, please.

A One of the possibilities discussed was the recapitalization of Newburger, Loeb, and there were a number of people that thought that in line with the recapitalization, it would be advantageous to change the structure from partnership to corporation, which was then what most of the larger New York Stock Exchange firms were doing, which gave the principals the benefit of limited liability which they did not have in a partnership structure, so we set up the corporation to save the name.

Q And who instructed you to do this?

A I believe I told you before, I do not --

Q Who was named as the incorporators?

A I haven't got the vagues idea.

Q Is that that preliminary corporation contained in the closing binder?

A My recollection is that the preliminary corporation was a New York corporation.

Q Yes, and it is --

A And this is a Delaware.

Q You have no papers about it now and you don't remember who the incorporators were, and you don't remember who instructed you to --

MR. SHAW: Wait a minute, the witness hasn't answered the question and he is being asked another question.

A The incorporator was probably someone in my office.

Q Who gave -- and you say you don't know whether Persky gave you the instructions?

A I do not know from whom I got the instructions.

Q Can you remember discussing that October incorporation with anybody?

A I presume somebody told me to incorporate it. Otherwise I would not have had it done but other than that, no.

Q On direct you said you did not recall whether you edited certain papers, a certain document read by Mr. Kayne at a partnership meeting of August 24, 1969; is that correct?

A Yes, I have no recollection of that document at all.

Q You don't know what was said in it, you have never read it to this day, is that your testimony?

A No. My testimony is that I today do not recollect having ever seen it before.

Q Do you remember whether you ever discussed it with Persky?

A I have no recollection with respect to that document.

Q Can you remember having a discussion with Persky at some point about the plans of Risher, Kayne and Muh and others to buy the business? Or to get control of the business?

A Yes.

Q Pardon?

A Yes.

Q When did that discussion take place?

A It would be -- well there were a series of discussions in --

Q The first one.

A The first time that I can recollect having a discussion which involved any one of Risher, Kayne, and Muh, as you say, taking control of the corporation, or being in the primary force in recapitalizing the corporation, was -- would be in the latter part of November, I guess, or maybe the early part of December. There were various people at that time who were trying to get new capital because one of the alternatives that the New York Stock Exchange had laid open for Newburger, Loeb was to bring in new capital which would restore the net capital to a proper ratio, proper amount.

Q I am asking you about your first conversation with Persky about Risher, Kayne, and Muh trying to get control; and --

A At some time either I believe in the latter part of November or the early part of December, Mr. -- I have a recollection of Mr. Persky telling me that one of the alternatives available was that Mr. -- I believe it was Mr. Risher -- was looking for capital sources so that he could bring in -- be the primary force in recapitalizing the business.

Q And not before then?

A I do not know. I don't have a specific recollection of that date either so --

Q Did there come a time when Persky told you that you and he would represent Risher, Kayne and Muh and others as acquirers?

A Yes.

Q When was that?

A In December.

Q Not until December?

A Yes. Yes, not until December.

Q And about what time in December?

A When it became clear, which I believe was in December, when it became clear that the only likely alternative to liquidation or dissolution of Newburger, Loeb was through Mr. Risher and Mr. Muh and Mr. Kayne came in later for various reasons, Mr. Risher and Mr. Muh being the primary force, there were discussions at that time about who would represent whom, and since our initial contact with Newburger, Loeb was through Mr. Risher and Mr. Muh, at some point, and I think the final decision was made late in December that we would, when it looked like a deal was in hand, that we would represent the corporation, and rather than having all the various counsel representing individual partners, they chose one of their lot to represent the partnership in that transaction, and that was Mr. Burak's firm, the Rosenman firm.

Q Is it fair to say that the key to the acquisition of control by Risher and Muh and Kayne and Berkowitz and Sloane was the Aixala money?

MR. SHAW: That is argumentative, your Honor, and I object. As far as I can see there are about a half a dozen different keys, including the tax refund transfer, including getting all these different people to go along with it.

I think it is an unfair question.

THE COURT: Why don't you ask him whether he considered that an important factor.

MR. SHAW: It is certainly an important factor. Can we proceed to other areas?

THE COURT: No, he is entitled to ask this witness that.

MR. SHAW: How can there be any dispute about that, whether a million dollars is important or not.

THE COURT: Let us get this answer before going on to something else.

THE WITNESS: There is no question that without a million dollars from some source, the recapitalization could not take place.

Q And the fact is that it was Risher and Kayne and Muh who brough in Aixala's million dollars, is that right?

A I am not sure of how the million dollars came in but the million dollars, Mr. Aixala's million dollars, came in together with Mr. Risher and Mr. Muh.

Q Now, when did Persky tell you for the first time about Axiala?

A I would think in December 1970 but I am not sure.

Q In September --

MR. GRUTMAN: December he said.

MR. MANDEL: I heard him.

THE COURT: All right, go ahead.

Q In September, did Mr. Persky tell you he had met Aixala, who might be interested?

A I have no recollection of that one way or the other.

Q How about October of 1970?

A I do not think I heard of Mr. Aixala until later on.

Q You think the first time you heard Aixala's name was in December of 1970?

A That would be my best recollection at this time. Maybe the latter part of November.

Q And from whom did you hear Aixala's name first? Was it from Persky or somebody else?

A Probably from Mr. Persky.

Q What did Persky tell you then?

A Mr. Persky told me that there was an investor -- a potential investor named Aixala who had some connection with Bacardi or the Bacardi interests, who had expressed interest in putting up money for the recapitalization.

Q Did he tell you he had found Aixala rather than Risher or Kayne or --

A I believe he mentioned that he had been involved in finding Mr. Aixala.

Q And did Mr. Persky ever discuss with you why he recommended Aixala to throw in his lot with the Risher and Muh and Kayne group rather than with the partners, the existing partners of Newburger, Loeb & Company?

MR. SHAW: I am going to object to that on behalf of Aixala, your Honor.

THE COURT: No, overruled.

THE COURT: Could you read the question again?

THE COURT: Yes, I will have it read.

(Question read.)

A No.

Q Were you aware, in January and up to February 11, of 1971, that if the proposed deal was consummated, Finley, Kumble -- was not comsummated, excuse me -- Finley, Kumble would receive no work -- no fee for the work done in representing the corporation in attempting to make the purchase?

MR. GRUTMAN: That is not correct, your Honor. We would not be paid that portion of the fee which had not yet been paid in that regard. A portion of the fee had already been paid.

THE COURT: This is what this man has heard. Regardless of what the fact may be, either he heard it or he didn't. Mr. Bamberger?

THE WITNESS: Yes, I knew that if the transaction were not closed, that a significant portion of the fee would not be received, yes.

Q What portion of the fee would be received if the deal were not closed?

A I believe we were -- we were to receive disbursements paid and possibly some of the fee. I was not directly involved in the making of the fee.

Q You also knew that Finley, Kumble had another stake in having the deal go through, namely that it would get a good client, right?

A Yes.

Q I think you testified in response to Mr. Grutman's questions that Miss Bleich and Mrs. Donoghue were withdrawn limited partners, is that correct?

A Yes.

Q You also testified that you studied the partnership agreement of Newburger, Loeb & Company quite carefully, right?

A Yes.

Q You realized during January and February of 1971 and especially on the night of February 11th, that the withdrawal of Bleich and Donoghue was not yet effective; is that correct?

A That they what, that they were not yet entitled to the return of their capital contribution, yes.

Q That was not my question. My question was whether you realized that their withdrawals were not yet effective under the terms of the partnership agreements.

A Well, it depends what you mean by effective, Mr. Mandel.

Q All right.

A I mean, I think that they were effective in that the notice of withdrawals having been given, commenced a train of events, the last step of which was the return of their capital. During this period the capital was at the risk of the business. If that is what you mean by not yet effective, the answer is yes.

Q No, I am talking about the right to vote, under Article 98, if limited partners had a right. Were they still limited partners in your opinion, within the perview of Section 98 of the Partnership Law? And I am asking as to your opinion on the night of February 11, 1971.

A May I see a copy of the partnership agreement?

Q You don't remember?

A Mr. Mandel, it is five years ago.

Q Well, let's be clear about this, Mr. Bamberger; you are telling me now that without looking at the partnership agreement, you do not remember whether your opinion was on February 11th that Bleich and Donoghue were still effectively partners?

A Yes.

Q You don't remember one way or the other?

A Yes.

Q Do you remember the opinion that was rendered that you and Mr. Persky agreed upon?

A Are you referring to the opinion as special counsel?

Q Yes.

A Yes.

Q Was that opinion based in whole or in part on your conclusion that Bleich and Donoghue were withdrawn limited partners?

A It was relied in part on the fact that they were limited partners who had given a notice of withdrawal, without getting into the effective date of it.

MR. GRUTMAN: That is exactly what --

Q Did your opinion letter, as you recall it, state that the fact that they had given notice of withdrawal was germane?

MR. GRUTMAN: I object, your Honor. The document is in evidence. It speaks for itself and it is the third paragraph of the first page.

THE COURT: It does. The exhibit speaks for itself.

MR. MANDEL: All right.

Q Do you recall discussions that night between yourself and other counsel?

A Yes.

Q Do you recall telling Mr. Steefel that Bleich and Donoghue were withdrawn limited partners?

A No. I don't recall one way or the other. I am not -- I was -- was Mr. Steefel there that morning? I don't remember specifically.

Q You don't remember if Mr. Steefel was present at the closing of February 11th?

A I do not remember whether he or someone from his office at this time.

Q And you don't remember discussions with Mr. Steefel?

A No, sir.

Q And you are not aware that Mr. Steefel was called here as a witness by Finley, Kumble to the events of February 11th?

THE COURT: That does not have much to do with it, Mr. Mandel, I don't think.

MR. MANDEL: All right.

Q You testified on direct that substantial work was done by you and under your direction on the Section 98 question after it had been raised by Mr. Persky; is that correct?

A I don't believe I used the word substantial. I said that work had been done.

Q Did that work result in a memorandum of law?

A No, sir.

Q Did that work result in any kind of notes or paper work?

A That work resulted in a series of Xerox copies of cases, which were marked up to the best of my recollection.

Q And what happened to those Xerox cases?

Q Where are they?

A My guess is that they were thrown away before the closing or else following it.

Q And what is the name of the Pennsylvania case you say you relied upon?

A I do not remember it by heart. I could probably find the name for you and give it to you later.

Q Later, yes.

A It was an old -- it was a Pennsylvania case in the latter part of 19th Century; and involving an insolvency-type situation.

Q Involving what?

A An assignment to creditors.

Q To creditors? Did you find any New York cases more recent involving assignments to creditors?

A No.

Q Did you look?

A Yes.

Q Did you look -- under what sections of the Partnership Law did you look?

A We looked primarily under Section 98 and we looked more generally in the various digests under the partnership rights of general partners and rights of limited partners.

Q And what did you find in the New York law?

A The only relevant case that I remember was the Mississippi Properties case which I believe is a Kings County Supreme Court case.

Q Now, sir, you were aware of the Buckley case prior to the night of February 11th, were you not?

A Yes, sir.

Q And you were aware that the Buckley case had been settled by Mr. Persky, were you not?

A I was aware it had been settled.

Q And you were aware that in the settlement of the Buckley case Mr. Persky got an assignment of the Buckley claim from the Buckleys to the partnership, is that correct?

A I can agree to that except that I do not know it was Mr. Persky that did it. I do not know who physically settled that case.

Q But you knew about the assignment?

A Yes.

Q You knew before the night of February 11th, that Gross, Bleich, and Donoghue were not going along with the proposed transfer agreement and were not signatories; is that correct?

A One of them was a signatory on the --

Q I am talking about the night of February 11th, sir.

A On the original agreement.

Q And you knew -- or that date I should not say that night -- on February 11th and February 10th you knew that Gross, Bleich and Donoghue would not be signatories to the agreement,is that correct?

A Yes, sir.

Q And at the closing, they were not represented by any representatives?

A Yes, sir.

Q And am I right there was no place for them to sign on the draft?

A I do not know but I --

Q All right.

Did you have any conversations on February 11th or before with anybody as to what would be done about Gross, Bleich and Donoghue at the closing?

A Yes.

Q With whom did you have such conversation?

A There were discussions, I presume, I don't know with whom there were discussions -- in preparing the schedules of the liabilities to assume, to be assumed in the course of discussions with, I believe -- I don't know who -- we worked -- we prepared a schedule and then sent it out to a long list of lawyers, and it went around and various lawyers would call me to discuss their -- to give their comments. But in that series of discussions, one of the things that was discussed was that the claim of Mr. Gross, Miss Bleich, and Mrs. Donoghue were to be liabilities assumed by the corporation; and in fact they are so scheduled, I believe.

Q All right. Now knowing that those liabilities were to be assumed, did you know the liability to Miss Bleich was $75,000 plus interest?

MR. SHAW: Objection. He has testified claims. Now it is transferred into liabilities.

THE COURT: That is what they have been discussing here. Overruled.

MR. GRUTMAN: Contingent liabilities.

MR. MANDEL: Please, they are coaching the witness.

MR. GRUTMAN: Coaching my foot, it is on the document, Judge.

THE COURT: Overruled. No, he is asking him what his knowledge was.

A She had a -- the capital -- to the best of my recollection, the capital of Miss Bleich and Mrs. Donoghue were each $75,000, and assuming that that was all there, that would be what their claim is.

Q When you say assuming that was all there, what do you mean by that?

A Assuming that there was sufficient capital to pay it out, because there are people that come ahead of the limited partners.

Q Now you knew, did you not, that the corporation which assumed the obligation was able to pay Bleich and

Donoghue in full without trouble?

MR. GRUTMAN: When?

Q Immediately after February 11th.

MR. GRUTMAN: Objection, that is not the test of her entitlement.

THE COURT: No, overruled. That is not the test of the question either. Overruled.

Did you not know that?

THE WITNESS: Did they have $50,000? The answer is probably yes. Were they legally entitled to pay out $150,000? That, I don't know.

Q Did you have an opinion about that?

MR. SHAW: Objection, your Honor.

A No.

THE COURT: It has been answered.

THE WITNESS: Sorry.

MR. MANDEL: I am sorry.

THE COURT: It has been answered, I said.

MR. MANDEL: All right.

Q Did you participate in any discussion with anybody as to what was going to be done about Gross, Bleich and Donoghue after the closing?

A No, sir.

Q Did Persky tell you that he planned to bring action within days on the Buckley claim?

A I do not -- he may -- he may have. I do not have a specific recollection. When the action was -- I knew there was talk about the Buckley claim prior to it. I believe there was talk at the meeting at Golenbock & Barell; but I do not know whether he told me he was going to bring the action, no, sir.

Q At the meeting in Golenbock & Barell, you heard Persky say that he had good claims against Gross and Bleich and mentioning the Buckley claim, right?

A Yes, sir.

Q And you heard him say that if they didn't go along with the deal, there were offsets and counterclaims to any rights they may have to get their money back?

A Yes.

Q You understaood on February 11th that absent any off sets or counterclaims, Gross, Bleich and Donoghue were not bound by the transfer of assets to the corporation, right?

MR. SHAW: Objection, your Honor, that is two totally unconnected concepts. I think that as a matter of form the question is wrong.

THE COURT: Let me hear the question.

(Question read.)

THE COURT: I will sustain it.

MR. MANDEL: All right.

THE COURT: Mr. Mandel, whenever you come to a good resting point.

MR. MANDEL: It won't be more than two or three minutes.

THE COURT: Go ahead.

Q You understood on the day of February 11th that Gross, Bleich and Donoghue had not consented to give up any rights against their partnership and to accept any returning paper or other claims against the corporation; is that correct?

A Yes.

Q And you understood that they still had their rights against the partnership, is that correct?

A Right, yes.

Q And you understood that the corporation had assumed any liabilities of the partnership to Gross, Bleich and Donoghue?

A Right.

Q Is that correct?

A Yes. Whatever they may be.

Q Whatever they may be.

Was it your understanding from reading the partnership agreement that the general partners were obligated for all losses and were obligated to repay at the end of the term of the partnership all of the capital of the limited partners?

MR. SHAW: I think that should be broken down into two questions. It is very complicated, your Honor.

THE COURT: Overruled.

Can you answer that?

THE WITNESS: Okay, the general partners are liable for all the liabilities of the partnership, yes. I do notk five years later, recall whether in effect the general partners guaranteed the limited partners the return of all of their capital, which sometimes happens, or whether this was one of those instances where whatever the capital entitlement of the limited partner is on the date of the accounting, that is what they are entitled to, and that is what they can go against the general partners for.

Q You don't know which way?

A I do not.

Q That agreement was -- you don't recall?

A Mr. Mandel, I have looked at lots of partnership agreements since 1970, no, sir.

Q On February 11th, did you know?

A I probably knew.

Q All right.

Mr. Bamberger, what was your understanding on February 11th about what was going to be done about the claims of Gross, Bleich and Donoghue?

MR. GRUTMAN: He has already said, your Honor, he doesn't know.

THE COURT: Overruled.

A What was going to be done about them?

Q Yes.

A That whatever they were entitled to, they were going to get.

Q Didn't you know that offset and counterclaims were going to be placed against them?

A That does not change -- yes.

THE COURT: Did you know that?

THE WITNESS: Did I know? I knew that offset that -- with respect to Mr. Gross, I knew on that day that the partnership had claimed certain offsets and claims against him which would be set off against monies due to him.

Q And how about Miss Bleich?

A I personally do not know whether on February 11th I knew Miss Bleich's situation.

Q You don't remember one way or the other?

A Yes, sir, I do not.

Q How about Mrs. Donoghue?

A I knew very little about Mrs. Donoghue.

Q At least we can be clear about one thing.

MR. SHAW: I am going to object to that, your Honor. I think the witness has been very clear all along and quite candid.

THE COURT: Strike out that comment.

Go ahead.

MR. MANDEL: All right.

Q On February 11th, there were discussions as to not paying Gross, correct?

A No, that is not what I said.

Q No, I am asking -- I am not asking what you said. I am asking for the fact.

A No, not paying Gross.

MR. SHAW: I object to that, your Honor, that is a slur.

MR. GRUTMAN: I object to that, too.

THE COURT: No, that is not a slur. He is asking whether something happened or not as a fact.

MR. SHAW: He said, I am not asking what you said but what was the fact.

That implies to me that the man is not telling the truth.

THE COURT: I didn't so understand it that way.

MR. MANDEL: I didn't mean it that way.

THE COURT: I didn't think it was intended that way and I didn't take it that way.

MR. SHAW: I am sorry, your Honor.

MR. MANDEL: This is a good time to stop.

(Luncheon recess.)

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AFTERNOON SESSION

M I C H A E L   A.   B A M B E R G E R,

resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Bamberger, in questioning on direct, in response to questions from his Honor, I think you said that there was a right to waive the opinion letter on the part of the transferee; is that correct?

A Yes.

Q And you said that that right was expressed in some document.

Which document did you refer to, the document of December 31st or the document of February 11th?

A The document -- the time transfer agreement. I believe it is dated December 31st even though it --

Q But what you are saying is that there was a right to waive under an agreement which had not yet been signed by anybody? Is that what you are saying?

A No, sir. I am saying that document was a revision of a prior document which was executed on December 30th, December --31st, and modified along the way as well, and I believe throughout the entire period the conditions were waivable by the parties.

Q Well, the document signed on December 31st was not a complete binding document, is that right?

A It was not a complete document.

Q And it was not binding on anybody, right?

A I am not sure, Mr. Mandel. It seems to me it was an agreement in memorandum, memorandum of intent, whatever you wish to call it. There were certain understandings as to what the schedules were to contain, which were not then affixed, and that by itself does not make it a non-binding agreement.

Q What is your honest opinion expressed in court today? Was the document signed on December 31st binding on anybody?

A If someone frivolously or maliciously refused to carry out the terms of that agreement and provided that all the conditions were carried out, the document would be enforcible against that person, yes.

Q That is your opinion?

A Yes, sir.

Q Even though it didn't have schedules. I ask you if it isn't true --

MR. SHAW: Objection, there is no question, even though it didn't have schedules. Just a moment.

Q Is that your opinion, even though it didn't have schedules attached?

A There were understandings as to what the schedules would contain, and assuming that the final schedules contained what was understood, it would be binding, the same way that there are lawsuits on memorandums of intent, for example.

Q You adhere to your opinion that it was binding even though it was revised again and again in the period between December 31st and February 11th and there were negotiations about it, all participating?

Would you answer my question?

A Is that a question?

Q Yes.

MR. SHAW: I think it is three parts.

MR. MANDEL: I will withdraw the question.

Q It is true, is it not, that the document was -- the agreement was substantially changed between December 31st and February 11th?

A It was changed. The basic outline of the agreement did not change.

Q You say there were no substantial changes, sir?

A No, I did not say that.

Q Were there substantial changes?

A Parts of it were substantially changed, parts of it remained the same.

Q Among other things -- strike that -- it is true, is it not, that at all times between December 31st and February 11th, in the negotiations, all of the parties acted as if nobody was bound, including you?

MR. GRUTMAN: Objection.

THE COURT: Why?

MR. GRUTMAN: That calls for a conclusion as to what people did and whether or not they believed that they were bond or not. People may have made requests but that does [illegible] necessarily disaffirm a recognition of an obligation to which they were bound.

THE COURT: All right, I will sustain the objection.

Q Did Finley, Kumble do anything which indicated that nobody was bound by the papers signed on December 31st?

A Finley, Kumble -- not to my knowledge.

Q You are aware, are you not, that maybe Bleich signed the agreement of December 31st?

A Yes.

Q And you are aware, are you not, that later on, by her attorney, she indicated she would not go along with the agreement on February 11th?

A Yes.

Q And you are aware, are you not, that Mr. Robert Newburger sent out a letter saying that if Bleich and Donoghue didn't sign, the whole thing would be dropped?

A Yes.

Q And you are aware that Mr. Persky sent out a similar letter saying that if Bleich and Donoghue would not go along with the February 11th agreement, the whole thing would be dropped, right?

A Right.

Q Is that inconsistent with your statement that in your opinion everybody was bound by the agreement?

A No, sir.

Q No?

A No, sir.

Q Will you explain that?

A Because there is a difference between your legal rights and your practical rights. If we had had a lot of time, you can sue people and force either specific performance or sue them for damages. That was not what was happening. We were under a very specific time schedule set by the New York Stock Exchange, and if certain things didn't happen by a specific time, which time shifted but it was always a specific time, if things did not happen by a specific time, the firm was going to be suspended, dissolved, liquidated, whatever the appropriate language is. And they didn't care whether you were in the process of suing somebody for -- because you had a binding agreement that they wouldn't carry through or not. They wanted -- they insisted to a recapitalization happening by a given time, so as a practical matter, whatever one's legal rights were, one had to look -- had to look at the practical aspect of the situation, which was that unless the transaction could be appropriately closed within the timeframe set forth by the Stock Exchange, Newburger, Loeb partnership would go under.

Q These letters sent by Persky and by Newburger related to Bleich and Donoghue, right?

A I believe they did. Could I see them? I believe they did.

Q Do you remember the letters?

A I remember the substance of the letters, yes.

Q I give you I think it is Defendants' S dated February 2nd, signed by Mr. Persky.

A This letter does not involve Mrs. Donoghue. This letter involves Mabel Bleich.

Q All right. So Mabel Bleich had signed December 31st, right?

A Right.

Q And now she said she would not go along on February 11th, right?

A Right.

Q And Persky did not say she is bound, did he? He said something quite different, right?

A Right.

Q He said unless she goes along the whole thing will be dropped, right?

A Right.

Q Were you familiar with that letter before it was sent?

A I was familiar with it at or about the time it was sent.

Q Were you consulted about it?

A I don't know whether I was consulted about it or informed about it. One or the other.

Q Did you say to Persky, "We may be waiving a a valuable right by sending this letter because I think she is bound"?

A No, because we were dealing with practical problems, Mr. Mandel. Valuable -- our sole attempt was to prevent this company from going under and thereby hopefully protect the limited partners and the subordinated lenders and all that, and to talk about legal rights in a general thing that you might be able to sue later on after the business has gone under does not make any sense.

Q Why sue later? You could have transferred it under the December 31st agreement, according to you; the same transfer could have been made, right?

A Sir, I don't understand that question.

Q We are talking about a transfer of assets to a corporation.

A Right.

Q And if it could be done under the new agreement, which Mabel didn't sign on February 11th, why couldn't the transfer be made under the old agreement which she did sign if it were binding?

A Well, two things, number one, the new agreement involved certain changes as you yourself have pointed out, from the old. To make changes requires the consent of all of the appropriate parties. You can't unilaterally or by a small group of people who sign an agreement change certain terms of the agreement; or it at least raises legal questions.

Q So you are saying that without the changes the agreement could not have gone through or would not have gone through?

MR. GRUTMAN: That is not what he said.

A I don't know. That is not what I said. What I said is that if you wanted to make the changes, you would need the signatures.

Q You are also saying that without Mabel Bleich, the changes could not be made, correct?

A No.

Q That is what Exhibit S implies?

A No, sir.

Q No.

A No, what Exhibit S implies, which I presume is the letter that you showed me, right?

Q Yes.

A What Exhibit S implies, in fact says, is that without Miss Bleich, the transaction will not go through. One of the -- the whole problem of this transaction, as I think I mentioned this morning, is the variety of persons with diverse interests, and holding them together and making sure that nobody believed that somebody else was getting beneficial treatment.

If Miss Bleich did not go along, she in effect would not be deferring whatever right to money she has, whereas other people were, and that therefore she would be getting preferential treatment. This was unacceptable to the subordinated lenders who were in a priority position to the other limiteds, to some of the generals, who were waiving all kinds of rights; and that is what that letter means.

Q What happened between February 2nd and February 11th to change the promise by Persky that without Mabel Bleich the deal would not go through?

A I would not characterize that letter as a promise.

Q All right, the threat, the statement.

MR. SHAW: Objection.

A I wouldn't characterize it as a threat.

Q What happened? The statement, what happened?

A What happened was that the other parties changed their position to the extent that they were amenable to letting Miss Bleich have a money claim against the corporation which they would not have and to that extent have a --

Q Are you testifying from your personal knowledge?

A Yes.

Q Which parties changed their position?

A When the letter was written, it was, to the best of my knowledge, the position of all of the parties, and particularly the various subordinated lenders, who had a priority position, and the other limited partners, who were being downgraded, that everybody had to be treated equally, that you could not pluck out one or two people and give them different treatment, what they believed to be preference treatment.

Q Who made you aware of this? Whom did you speak to?

A The various counsel for the various subordinated lenders and limited partners, who were about a dozen people.

Q You had such discussions with them before February 2nd when Exhibit S was sent out?

A Yes, with various of them.

Q Which ones?

A I do not recall which ones.

Q After February 2nd when Exhibit S was sent out, they changed their minds, according to your testimony?

A Yes, sir.

Q Which ones? Who told you?

MR. SHAW: We have two questions? Could we have which ones and then secondly who told you?

THE COURT: They are the same thing?

MR. MANDEL: Yes.

A They all changed -- those who had taken the adamant position, and there was always group positions. Nobody wanted to let anyone else go. As the February 11th date became closer, and they saw that it was a question of not closing or closing with the liability to

Misses Bleich and Donoghue, they decided that the amount of money involved in the total was not such a preference that they were willing to lose the transaction.

MR. SHAW: I am sorry, we lost the tail end of those words. We decided that what?

THE COURT: Preferences as to what, as to what?

THE WITNESS: As to lose the deal.

MR. SHAW: Lose the deal.

THE WITNESS: Lose the deal.

THE COURT: Lose the deal.

Q My question to you was, with whom did you have discussions about this, persons who changed their minds?

A Five years later, I cannot remember which lawyer represented which group. To the best of my recollection, we spoke to -- I spoke to people such as Daniel Shapiro of the Baron, McGoldrick firm, who represented Leo Stern, was it, or -- is that the man's name?

MR. GRUTMAN: Yes.

A I don't have the names in front of me. We spoke with people at the Willkie, Farr firm where there was Mr. Bialkin and Mr. Lewis representing the Dworkin group; and you know, it --

Q You spoke --

A We had in total, I don't know whether it is put into evidence, there was a list of counsel that we distributed things to that ran to 15, 16 or 17 names.

Q Mr. Bamberger, my question is quite simple: Without generalizing, can you tell me which counsel told you after February 4th that they changed their mind and they were now willing to go ahead even though Miss Bleich would have a preferential position?

MR. SHAW: Isn't the date February 2nd?

MR. MANDEL: But the dealine was February 4th.

MR. SHAW: All right.

Q Can you remember any specifically?

A No, sir. No -- I do not remember any specific conversations at this time.

Q You don't know whether they spoke with you or with Mr. Persky?

A Some of them spoke with me and some of them spoke with Mr. Persky.

Q That you remember?

A Yes, sir.

Q And did anything else happen after February 2nd and after February 4th to make any of these people change their mind about what Mabel should or could get?

A Lots of things happened. This was a period of time when lots of things were going on, and where discussions were going on, where we were attempting to clear up a lot of the various problems. I mean all these things were happening at the same time. I am not quite sure what you --

Q Among other things that happened in that period, Mr. Bamberger, was the fact that Mr. Persky exhibited a complaint against Gross and Bleich and Gross & Company at a meeting. Do you recall that?

A I do not believe that was after February 2nd.

Q That was on February 5th, was it not?

A Perhaps. I don't know. Was it? My recollection was it was --

Q All the testimony is February 5th, including Mr. Persky.

A Fine.

Q Do you think that had anything to do with the change of position of these people who didn't want Mabel to get a preference?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

A Not that I know -- I have no recollection of anyone having said to me that that caused their change of mind.

Q Were you present when Mr. Persky exhibited that complaint?

I mean the complaint in the partnership name which was never served.

A I do not know whether I was present. I was present at one meeting at Golenbock & Barell but I am not sure it was that one.

Q Were you aware of the fact that Mr. Persky had prepared such a complaint?

A Yes, I believe I was.

Q He discussed it with you, right, before he did it?

A I don't know whether he discussed it with me before he did it. I am sure he mentioned it to me when he did it.

Q And what did he tell you about it? What was the purpose of that complaint?

A Mr. Persky had told -- well, Mr. Persky and I, and more he than I, had attempted through the end to try and resolve the various differences so that there would be as few loose ends as possible. Therefore, Mr. Persky hoped to the end that he would be able to get Mr. Gross to consent to some arrangement since the understanding we had was that until Mr. Gross consented with something, Miss Bleich and Mrs. Donoghue would not consent.

Mr. Persky was impressed, told me that he thought that the best discussion, the best way of making Mr. Gross aware of the seriousness of the claims that were being asserted against him was to demonstrate to him that there was a claim which had been asserted originally by a separate law firm, and by a separate group, in fact, that appeared to be of substance. For that purpose the complaint was prepared.

Q Between February 2nd and February 11th, did you discuss that complaint with the representatives of any of the limited partners or subordinated lenders or general partners?

A Did I discuss the complaint? No, sir.

Q Did Persky?

A I do not know.

Q You do not know. On February 11th, is it fair to say that everybody who attended knew about that complaint which had been exhibited on February 5th?

A Whether everybody knew I don't know. A good number of the people knew not about the complaint necessarily but about the existence of a potential claim against Gross & Company, Mr. Gross.

Q I am right in understanding your testimony a little while ago that the lawyers for the limited partners and the lawyers for the subordinated lenders understood that if there were no offsets or claims to be asserted against Gross, Bleich, and Donoghue, then by not going along with the transfer agreement, Gross, Bleich and Donoghue would get a preferential position, right?

MR. SHAW: What?

THE COURT: Let's see what he says.

MR. SHAW: There is a double negative there.

THE WITNESS: Read it.

MR. GRUTMAN: The witness has asked for the question to be reread.

THE COURT: Yes, read it.

(Question read.)

A That they would have -- the question is difficult because it posits a set of facts that weren't. I mean the understanding of the limited partners and the subordinated lenders as well as the general partners was that there were claims and offsets certainly against Charles Gross, and I don't know about the other two ladies.

Q You haven't answered my question, which related to you.

A I was just explaining to you why it is a difficult question to answer.

Q Am I right that you testified before that the lawyers for the limited partners and subordinated lenders, and I will add general partners, felt that if the transfer agreement went through, without the participation of Gross, Bleich and Donoghue, those persons would get a preferential position unless there were some offsets or claims against them.

Now, was that your testimony, about --

A No, depending what the value of their claim was. That they would have the right -- that if it went through and if they did not consent, and if there were no offsets, claims against them, that they would have a right against the corporation for funds, for money, for whatever the value of their claim was, which might have been zero, which might have been significant.

Q How would it be zero for Bleich and Donoghue?

A I do not know right offhand what their capital accounts showed on that date.

Q Aren't you aware that the Peat, Marwich statement shows $75,000 for each of them?

MR. SHAW: Objection, your Honor, there has been testimony on that.

MR. MANDEL: I am asking him about --

A The answer is no.

Q You are not aware of that?

A No.

Q Aren't you aware that the New York Stock Exchange required a reserve to be set up for Gross, Bleich and Donoghue?

MR. SHAW: Objection, your Honor.

THE COURT: Overruled.

MR. SHAW: That is misleading also because it was contested.

THE COURT: Overruled.

A Yes, but the New York Stock Exchange requires reserves for all types of contingent liabilities, many of which never come up.

Q I think you said on direct that you had examined the restated articles of limited partnership quite carefully and you had an opinion, and you said to me on cross that you didn't remember what your opinion was without looking at the agreement.

Do you recall I was asking you about whether the general partners had to make limited partners whole. Do you recall that?

A I remember the second half of it. The first half of your question which said that I read it carefully, had an opinion, but didn't remember it, I don't think that accurately states what I said.

THE COURT: Let's not get into that. Just ask him what the facts are.

THE WITNESS: What is your question?

MR. SHAW: Your Honor, can Mr. Mandel come back here?

THE COURT: No, he has got to hand him the exhibits. He can go where he pleases to do that.

MR. SHAW: When he is finished with that.

MR.MANDEL: All right.

Q Did you have an opinion on February 11, 1970, as to whether the partnership agreement required the general partners to make limited partners whole, that is, to return the full amount of their capital contribution on the termination of the partnership?

A I assume that I did.

Q Do you remember what it was?

A No, sir.

MR. SHAW: Your Honor, we have gone over this before. This is the second time.

THE COURT: Yes, we had this before.

Q All right, you said it depended on the wording of the agreement, is that right?

A Right.

Q Can you look at the agreement and refresh your recollection as to what your opinion was on February 11th?

A That is a long agreement. You want me to read it?

MR. GRUTMAN: It is 40 pages.

MR. SHAW: Why don't you direct his attention to the paragraph that you have in mind. Your Honor, I would object upon the ground the agreement speaks for itself.

THE COURT: No, gentlemen, no, that is no good either. Come up here, please.

The agreement does not speak for itself. It is a question of state of mind governing and motivating his conduct at the time so that --

MR. SHAW: Then I rely on the agreement. It is a long agreement.

(Discussion off the record at the bench between the Court and all counsel.)

(Pause.)

Q I ask you to look at paragraph 6.4 and see if that refreshes your recollection.

A Does it refresh my recollection? No, sir.

Q It does not refresh your recollection as to your --

A My then opinion, no, sir.

Q All right, I will take the exhibit back.

Mr. Bamberger, you said that there was an effort made to treat everybody the same way, or some such, is that correct?

A There was an effort to treat everyone fairly and not give preferences, yes.

Q You put in an affidavit dated July 1, 1972 used on the summary judgment motion in this case. Do you recall that?

A I recall that I put in an affidavit, yes.

Q And in that affidavit, I think that you said that Mr. Gross wanted special and preferential treatment, do you recall that?

A I don't recall my affidavit.

Q Pardon?

A I do not recall the specific language of the affidavit, no, sir.

Q Let me see if I can find the exact -- do you recall that at the top of page 4 you said, "Gross consisently demanded better treatment or preferential treatment to his partners."

A Yes.

Q You recall that statement?

A Yes, sir.

Q Gross was a withdrawn partners, was he not,on December 30th and February 11th? You knew that?

A Yes.

Q Yes?

A Yes.

Q He was a withdrawn partner with what I will call good capital.

Do you know what I mean by that, positive, plus capital?

A Yes.

Q That was true also, right?

A There was a dispute as to how much the capital was.

Q Yes.

And as a withdrawn partner, he had a somewhat different treatment, different rights under the partnership agreement from partners who -- general partners who had not withdrawn, that is correct, is it not?

A Yes, sir.

Q Wouldn't you say that it is fair to say that a partner who withdrew effective in September or October, he had a better position than general partners who were still with the firm on December 31st or February 11th?

MR. GRUTMAN: I object to the question.

THE COURT: Yes, sustained.

Q All right.

The fact of the matter is that under the transfer agreement, persons who were still partners, who had deficit positions were being forgiven portions of their deficit, right?

A To the best of my recollection, yes.

Q And what was desired from Gross was that he give up his claim to be repaid his capital, and that he take securities of a new corporation instead; is that right?

A Right.

Q And that is what you meant when you said in your affidavit that Gross always wanted better and preferential treatment than his partners?

A No, that is not what I meant. What I meant is that Mr. Gross wanted cash payments whereas many other people who had claims,such as subordinated lenders, who had rights, rights to cash, limited partners, who could withdraw and have rights to cash, they were all waiving and extending their period and that nobody was getting cash, and Mr. Gross was insisting on cash.

Q The foregiveness of debt of a general partner was a waiver of the corporation or the partnership to receive cash from such a person, was it not?

A Right.

Q So that you thought it was unfair for Gross to ask for part of his cash back, while general partners in deficit were being forgiven part of their debt, right?

A No, I wouldn't place it that way. I thought it was unfair -- really I didn't -- the parties, because I was simply a lawyer -- the other parties to the transaction thought it was unfair for Mr. Gross to insist on cash when other people who also had substantial cash into the business were not getting any cash.

Q Who were the other partners who were withdrawn who had possible capital besides Gross? Do you know of any?

A No, and I did not say that there were any other partners that had withdrawn that had cash. I said there were other people who had cash in the business, lots of people.

Q Mr. Bamberger, on direct you told -- you answered some questions of Mr. Grutman's I believe, and I think you said that you were not present at a meeting between Persky and Risher and Muh and maybe Kayne about the meaning or consequences of Mr. Burak's failure to give an opinion. Is my recollection correct of your testimony on direct?

A I believe so.

Q Pardon?

A I believe I testified that that was my recollection.

Q In fact, you were present at a meeting between Persky, Risher, and Muh, and maybe Kayne or Sloane,and yourself, in which there was extensive discussion of the opinion, the Burak situation; isn't that right?

A That sounds like the same question you just asked me before turned around again in the negative.

Q Yes.

A My answer still is that to the best of my recollection, I was not present at that meeting.

Let me spell it out. To the best of my recollection, I walked in with them and then I walked out and went back to work on some of the other documentation while they discussed this matter.

MR. MANDEL: Does your Honor have a copy of Mr. Bamberger's deposition? If not we have an extra copy.

THE COURT: Yes, I do.

MR. MANDEL: I have a copy for Mr. Bamberger.

(Transcript handed to witness.)

MR. GRUTMAN: Page please, Mr. Mandel?

MR. MANDEL: This is already in evidence I believe.

MR. GRUTMAN: I don't know the point of reading it again, your Honor.

MR. MANDEL: I am not going to read it. I am just going to confront Mr. Bamberger with it.

MR. GRUTMAN: Page 50?

MR. MANDEL: Yes.

Q Would you look at page 50 of your deposition, and 51, and see if that refreshes your recollection about your being present when advice was given.

MR. GRUTMAN: Now, your Honor, there is a shift in the question. The other question was being present while extensive discussions were going on. Now it becomes were you present when advice was given. It is quite a different matter.

MR. SHAW: He also defines "me" as being me, Persky, or the firm.

THE COURT: Let's see what Mr. Bamberger's answer is.

THE WITNESS: To be perfectly honest with you, Mr. Mandel, I don't find it too inconsistent.

Q Pardon?

A I do not find my two statements inconsistent.

Let me -- Mr. Burak made -- summarizing my best recollection now five years later of time sequence -- number one, Mr. Burak made a statement.

Number two, there were extensive discussions among the group and groups within the group, which is what I believe my testimony on 50 and 51 basically refers to.

Number three, following the point where a number of people requested of Mr. Persky that he attempt to draft an opinion letter from the Finley, Kumble firm, Mr. Persky and Mr. Risher, Mr. Muh, maybe Mr. Kayne, I don't know, went into Mr. Persky's room, which was not that far from the library, and proceeded with the discussion and commenced the drafting.

If I -- that is my present recollection. I don't think that is different in any real substance to what I said on pages 50 and 51. To the extent that it is different, what I am giving you now is my present best recollection.

Q Do you recall that you and Mr. Persky advised Risher and Muh that there were three alternatives: One that the deal could founder? Do you recall that so far? You don't have to -- I am not asking you whether you said that in the deposition.

A Yes.

Q It is the fact, right?

A Yes.

Q And you and Mr. Persky also advised Risher and Muh that possibly the opinion could be waived?

A Right.

Q And there was a discussion about that amongst you and Mr. Persky and your clients, right?

A A discussion amongst us and amongst others as well.

Q But this was a private meeting between you and Persky and your special clients, right?

A Yes, yes, but you know private doesn't -- there were lots of troups in a very large room.

Q Other groups were having their own caucuses at that time; is that right?

A Yes, sir, fine, yes, sir.

Q And you weren't sure if Mr. Berkowitz--that is Larry Berkowitz, right?

A Yes, sir.

Q -- was there at the same time?

A Yes, sir.

Q And you weren't sure whether Kayne was there at the same time, is that right?

A Yes, sir.

Q And is it fair to say that, having laid out all the problems and possibilities resulting from the refusal of Burak to give an opinion, you and Mr. Persky did not make a recommendation to your clients about what should be done?

A No, we did not tell them, "A you should do this." We tried to spell out for them the different possibilities and the different legal ramifications and all in the context of our view of the meaning of Section 98.

Q What possibilities and legal ramifications did you spell out to them?

MR. SHAW: Your Honor, aren't we over the same thing for the second and third time at this point?

MR. MANDEL: I don't think so.

MR. GRUTMAN: I do.

MR. SHAW: He is talking about all these alternatives that they had and that is a legal ramification.

THE COURT: Wait a minute, Mr. Shaw. Let's not get into that kind of discussion. Mr. Mandel, is this going to be something that we haven't had?

MR. MANDEL: Yes, I certainly hope so.

THE COURT: You anticipate that? Well, let's take it a little bit --

MR. GRUTMAN: Could we have a representation other than the statement that it will be new and different?

THE COURT: We are in cross examination. I will accept that for the moment.

MR. SHAW: The problem I have, your Honor, is that Mr. Mandel indicated he would take an hour and I have a witness waiting.

MR. MANDEL: The hour isn't over.

MR. SHAW: Almost.

MR.MANDEL: And you are not going to hold me.

MR. GRUTMAN: We have learned that.

MR. SHAW: We will try anyway.

THE COURT: Go ahead, please.

Q Will you answer my question, please, Mr. Bamberger?

THE WITNESS: Mr. Reporter, could you read the question again?

MR. GRUTMAN: What were the ramifications?

Q And the possibilities?

THE COURT: That is what it is, what were the ramifications and possibilities.

THE WITNESS: Okay.

Well, number one, we told them possibility number one is that the deal is not consummated. The ramification of that is that the next day the New York Stock Exchange suspends Newburger, Loeb partnership, commences liquidation proceedings, and based on what we knew at that time, the result would be disastrous for the partners, limited partners and subordinated lenders. That is possibility number one.

And the possibility vis a vis our clients would be that they would have spent a substantial time and effort on something that was not consummated, which happens, but which is something that one tires to avoid, if possible.

Possibility number two was that it could be waived. The problem with that is that a question has been raised with respect at least to ability of the one law firm to give an opinion with respect to authorization, without getting into the question of whether it was just difference of opinion or disagreement as to the meaning of the law.

We then talked about what would happen if the transaction went ahead and an action was brought in some way and the court found that Section--that our interpretation of Section 98 was wrong.

Q What did you say about that?

A And we said that we believed that based on the partnership law, that the parties would then be entitled to an accounting of whatever their interests were at that time, and that liabilty would probably attach to both sides, to both the corporate and the partnership.

Q Did you talk about the liability for conversion?

THE COURT: No, let's just go through what he said before we start getting into that. You had three things.

THE WITNESS: No, really two--those were the two things, the two alternatives that were basically discussed because at that time the opinion had really not come up.

THE COURT: Those were the ramifications?

THE WITNESS: Did we discuss conversions? No, sir.

Q You recognized that your answer to the Section 98 question was not one that was free from doubt, is that right?

A He recognized that it was at least a situation where people might differ, and Rosenman differed to the extent that they felt they were not secure enough to give a legal opinion at that time.

Q In the discussion with other attorneys, they expressed doubts and it was generally recognized that there was not a clear legal question; is that right?

MR. GRUTMAN: Who are the other attorneys referred to in that question, if your Honor pleases? Unless it is perhaps Mr. Mandel.

THE COURT: I take it--are you reading from a question in the deposition or answer?

MR. MANDEL: I am paraphrasing one.

THE COURT: Because I think that is why the problem with your interjection is that it is his attorney, he is the one who named the attorneys, not Mr. Mandel.

THE WITNESS: Did I say that?

MR. GRUTMAN: I don't know that he said that, Judge.

THE COURT: Where are we?

MR. MANDEL: Page 56.

MR. GRUTMAN: That is also in evidence. Just as I thought, it is Mr. Mandel.

THE COURT: No, it is both of them.

MR. MANDEL: I was not purporting to read. I was asking the witness for the facts.

THE COURT: Go ahead.

Q I guess now that he has read it we know what the answer is, right?

A No. Now Mr. Mandel, that is not--as you well know, there are lots of parts of the law that are not black and white. Were things black and white we could get rid of many of the lawyers that we have in the country, and life might be a lot simpler, but most factual situations are new to a certain extent, or involve new answers, and while it is nice to have to give a legal opinion on a nice solid fact such as is a company qualified to do business in a state, and then you get a certificate from the Secretary of State that says, they are qualified, and then you can give a legal opinion.

Most--when one gets into more complex transactions, very often the law is not as clear as one would like, and therefore one has to examine more than just, can I find a case in point.

Q All right, Mr. Bamberger, I think you said on direct that it was Mr. Risher who asked if Persky would not write the opinion; is that right?

MR. GRUTMAN: No, he said two things, Judge.

THE COURT: No, no, Mr. Grutman, please this is cross examination. This is a lawyer. He is a partner in a law firm. He can answer the question. If it does not accord with his recollection he will say no.

MR. GRUTMAN: All right.

THE COURT: If it does, he will say yes. But your interjection is inappropirate.

MR. GRUTMAN: Very well, Judge.

THE COURT: Mr. Bamberger is a very learned, educated, skilled, experienced lawyer. He can answer this question.

Go ahead, sir.

A I believe what I said is that it was my best recollection that Mr. Risher or Mr. Muh raised that question.

Q And they requested Persky to write the opinion; is that correct?

A Not requested. They asked Mr. Perskey whether he could write an opinion on this point; and Mr. Persky said that he would try to draft something in substance.

Q Did anybody else ask Persky to write the opinion?

A Did anybody else ask? The other attorneys present, to the best of my recollection, either said nothing or else indicated that they thought it would be a good idea for Mr. Persky to attempt to draft an opinion.

Q But the original idea came from Risher and they heard it that way.

A I believe so.

Q All right.

A I am really not sure that it is my best--

Q I now call your attention to page 53 of the deposition; and I begin on line 8 where I asked, "Whose idea was it that that be done? Who first suggested it?"

And I go on to page 54, line 5, and ask you if it is not true that on deposition you testified that it was the mass of other counsel who asked Persky to give the opinion.

A No, in fact that is not what I said. What I said, if you go back to 53, is that I thought--I then thought that the suggestion first came up from one of the counsel, I believe it was, for the general partners, quoting from what I have here.

As I said on direct, I have searched my recollection the best I can. My present recollection is that it was more likely to have come from a representative of the transferee. On the other hand, you know, whenever this deposition was taken, which is--my recollection was it was one of the other attorneys. I do not know which. I do know that the group desired, stated that they were more comfortable with an opinion.

As I believe I said on direct, I do know that when a draft was done, it was read to the assembled lawyers present, and when it was approved by all of them, it was put in final form.

Q Mr. Bamberger, you and Persky recognized that it was at least unusual for Persky to be acting as special counsel for the seller to give an opinion to his client, the buyer, as to the seller's power and authority to make the deal; is that right?

A The way it was set up, yes, but--

Q The question is--

A Really.

MR. GRUTMAN: Let him finish.

Your Honor, may he finish?

THE COURT: Go ahead, finish.

A But that part of the opinion could have either be required in the grievant to be given by counsel for the transferee or counsel for the transferer and the only reason it ended up in this circumlocuted manner was that that was the way it was originally set up. In fact, in many transactions the same opinion is given by both counsel.

Q Mr. Bamberger, is it your testimony today that it is unusual for the attorney for the buyer to issue an opinion as to the authority of the selling entity? Is that what you just said?

A No. No, you asked me a different question.

A No, I am asking you what you just said. Didn't you just say that it is unusual or not strange or customary for the attorney for the buyer to issue an opinion as to the authority of the seller, and that it is only an accident that it wasn't set up that way in this case?

A It is not unusual. For example, in public offerings, in registration statements, the attorneys for the--quite often the attorney for the underwriter gives an opinion that the company had the authority to issue the stock; which is the same thing. He is giving the opinion for the other side.

Q That is a separate statutory problem, is it not, because the underwriters have a statutory liability, which involves due diligence. Now, sir --

MR. GRUTMAN: Is what?

A Wait a minute.

THE COURT: No.

MR. GRUTMAN: Your Honor, the question is argumentative. The fact that there is a statutory liability does not make anything different if the liability exists at common law.

THE COURT: No, no, Mr.--the objection is overruled.

MR. MANDEL: All right.

Q Can you answer my question?

A I believe the answer is no, but I am not sure which way the question was turned around. Could you read me the question again?

THE COURT: Read the question back, please.

(Question read.)

THE COURT: Treat that as a question. Isn't that the fact.

Q Yes.

A The underwriters have an obligation of due diligence, yes, but that does not differentiate the circumstances because their due diligence could as easily be satisfied by getting an opinion from competent counsel of the issuer.

Q Well, Mr. Bamberger--

THE COURT: Wait, Mr. Bamberger, let's not spend a lot of time on this point. Mr. Mandel is asking you whether, in a buying and selling situation of a business, that it is the customary or can be done that the buyer is the one who gives the opinion that the seller has a right to sell. The buyer I am talking about. That is the question.

THE WITNESS: The buyer's counsel.

THE COURT: The buyer, through his counsel, gives the opinion that the seller has a right to sell.

THE WITNESS: No, it is not common.

Q In fact, on deposition, you recognized-- you stated that Persky himself said it was unusual to do it this way; is that right?

A Will you show me where?

Q Do you remember the question exactly?

A Show me.

Q Never mind the deposition.

MR. GRUTMAN: I object, your Honor.

THE COURT: Let's mind the deposition on this, Mr. Mandel.

Q All right, page 65, lines 10 through 19.

THE COURT: 20.

THE WITNESS: Yes, sir, that is--and I just said now in response to your question before that it was not unusual.

THE COURT: All right.

Q Mr. Bamberger, you prepared--

THE COURT: Mr. Bamberger, let me go back to something I asked you on direct examination. You remember I asked some question about whether or not this opinion letter was not required because others, aside from the transferee, had a stake in the assuredness that the seller had a right to sell, and I show you in your December 31st agreement, Exhibit 24, paragraph F, at page 28, which has to do with Mr. Aixala.

In reading that, would he have had the right and sent an opinion letter to say, "I won't give you the million dollars"? It says he does not have to come up with his million unless all the conditions are met.

THE WITNESS: Provided all the conditions.

THE COURT: And one of the conditions of the agreement is the opinion letter? I don't want to rush you into an answer, but doesn't that appear that he would have a right to say, "I am not going to put my million dollars in unless I am assured that the seller has a right to sell"? It makes sense too, does it not?

THE WITNESS: Yes, it may be.

Q Mr. Bamberger --

THE COURT: It would appear so, would it not?

THE WITNESS: Yes.

Q You told me a little while ago about the discussion between yourself and Persky, and Risher and Muh, which took place in a room where there were other people having meetings at the same time, right?

A Yes, sir.

Q Do you remember that you and Persky and Risher and Muh and maybe Berkowitz left the general meeting and went into Persky's office and had a separate private conference?

A That is what I testified to before. That is what I testified. Which he went through my short-cut of steps, what I said is after the initial portion we went into Persky's room, I just stayed there for a short while and then went back into the main meeting. They stayed there and out of that meeting came the draft.

That is what I believe I testified before.

THE COURT: Yes, that is what you said.

MR. SHAW: Your Honor, we are repeating and repeating.

Q You prepared numerous papers ancillary to the closing that are contained in the closing binder; is that right? That is Exhibit 1.

A Some were prepared by me and some were prepared by others.

Q Do you remember that it was necessary to execute and file an amended certificate of limited partnership of Newbruger, Loeb and Company to change the name?

MR. SHAW: How is this relevant, your Honor?

MR. GRUTMAN: Your Honor, I object to this. In the seventh week of the trial I have the nagging suspicion that Mr. Mandel has some other purpose for stalling. This is not productive and we are not advancing.

THE COURT: Where are you going with this?

MR. MANDEL: I would rather just take five minutes, the last question.

MR. SHAW: The last question, your Honor? Fine.

MR. MANDEL: It is the last thing.

THE COURT: They are withdrawing their objection.

MR. MANDEL: All right.

MR. SHAW: Hosanna.

Q I show you the amended certificate of limited partnership, which is another item number 6 in the closing papers. Did you draw that document?

A I don't believe so.

Q Who drew it?

A I don't know. I don't know whether it was drawn by the Rosenman firm on behalf of the partnership or whether it was drawn by somebody in my firm?

Q You notarized it, right?

A Yes, sir.

Q And you were familiar with its contents?

A I will read it. It is a change of number certificate.

MR. GLATZER: Mr. Bamberger, would you speak a little louder?

A Am I familiar with it? It is an amended certificate of limited partnership changing the name of Newburger, Loeb Company. I did not draft it; I don't know who did.

Q You are sure you did not draft it?

A Am I sure? No, to the best of my recollection, I did not draft it.

Q Did you file it?

A I don't know who filed it.

Q You notarized it?

A Yes, I notarized it because I was at the closing.

Q That document says it is signed by all of the limited partners and general partners, does it not?

A Yes.

Q And the signatures of Bleich and Donoghue do not appear on it, do they?

A Yes, they do not appear.

MR. MANDEL: Nothing further.

THE COURT: Can anybody tell me what the purpose of this instrument is?

THE WITNESS: They changed the name of the old partnership to N.S. Holding so that it wouldn't have the same name as the new--the new operating corporation.

MR. MANDEL: So it wouldn't interfere with the corporation's name and create confusion.

THE WITNESS: The old partnership just went into liquidation.

THE COURT: The instrument is what, filed in the County Clerk's office across the street?

MR. MANDEL: I believe that is right, your Honor.

MR. GRUTMAN: Yes, supposed to be.

THE COURT: I see. All right, very good.

MR. GRUTMAN: Done.

MR. MANDEL: Right. I took twelve extra minutes. I apologize.

MR. GRUTMAN: Thank you.

MR. SHAW: Could I have just one question? I have one question, your Honor.

RECROSS EXAMINATION BY MR. SHAW:

Q Mr. Bamberger, you testified there are two types of partnerships or partnership agreements. One of them werein there is a guaranty that the limited partners will get back their investment and another one where there is no such guaranty. Can you recall that testimony?

A That is one, yes. There are two ways that you can go on that point.

Q I would like to show you the partnership agreement and direct your attention to paragraph 9.4 and ask you which type of partnership do we have here where there is a guaranty running to the limited partners that they will receive back?

THE COURT: Mr. Shaw, just as you were saying before the instrument speaks for itself, will you point out to me which it is?

MR. SHAW: 9.4, your Honor.

No further questions.

THE COURT: Very good.

MR. GRUTMAN: I have no further questions of Mr. Bamberger.

MR. GLATZER: I have one question for maybe clarification.

RECROSS EXAMINATION BY MR. GLATZER:

Q Mr. Bamberger, in response to his Honor's question in regard to I believe paragraph F on page 28 insofar as it pertained to Mr. Aixala's rights under the agreement, were you aware of whether or not Mr. Persky had a power of attorney at the time of the closing?

A I have no recollection one way or the other.

MR. GLATZER: I have no questions.

MR. GRUTMAN: One question I omitted.

REDIRECT EXAMINATION BY MR. GRUTMAN:

Q In the December 31st agreements were any provisions made recognizing that certain persons who were in the employ of the partnership would, during the period between December 31 and February 11, be doing things that would be in the service of the prospective corporation?

A Yes.

MR. GRUTMAN: Thank you.

MR. SHAW: No further questions, your Honor.

THE COURT: All right, you may step down, sir. We will take our recess.

(Recess.)

ROBERT F. THERESE, called as a witnes, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SHAW:

Q Mr. Therese, how are you employed presently?

A I have an appliance store in Rahway.

THE COURT: In Jersey?

THE WITNESS: Yes.

Q Did there come a time when you were employed by Newburger Loeb Company?

A Yes.

Q When was that, sir?

A I believe early 1969 to April of 1972.

Q In what capacity were you employed by Newburger, Loeb Company in early 1969?

A Head of the margin department.

Q How long were you the head of the margin department of Newburger, Loeb?

A About seven months.

Q And did you continue to be employed by Newburger, Loeb after the seven months had elapsed?

A Yes.

Q In what capacity were you employed?

A I was moved into the operations department as assistant to the operations partner.

Q Who was the operations partner?

A Robert Stern.

Q Was that in or about July of 1969?

A Yes.

Q Will you describe for the court the functioning and the way the operation department for Newburger, Loeb worked during that period of time?

A Which period?

Q July 1969.

A You had a cashier, you had an acting head of the margin department who replaced me, a bookkeeping head, you had an accountant, and the order room which reported to Bob Stern.

Q What was the purpose of the operations department? What did it do?

MR. MANDEL: Excuse me, may I interrupt a second, Mr. Shaw? May I ask just for a clue as to which counter-counterclaim this is going to refer to, this testimony?

MR. SHAW: I think it is going to relate not only to the defense to conspiracy but also to several of the counterclaims. I can't be more precise than that, except to say that I believe the testimony is very relevant.

THE COURT: Go ahead, sir.

Q I ask you how the operations department fit into the functioning of Newburger, Loeb. Will you describe that a bit more precisely?

A Well, everything other than sales people, the brokers themselves, falls into operations. They are the bookkeepers of the firm; handle the stock and the money; and keep track of all the transactions.

Q And what was your function in relation to this operation?

THE COURT: Handling the stock and the money; keeping the books? What did you do?

A I was in charge of it.

Q You were in charge. During what period of time, sir, were you in charge of the operations department of Newburger, Loeb?

A From that time until the time we gave up our clearing.

Q Which was some time in the fall of 1970?

A Yes.

Q Do you know Charles Gross?

A Yes.

Q Did there come a time when there was an audit or examination of the records of Newburger, Loeb conducted by Peat, Marwick and Mitchell in 1969?

A I believe at the end of the year.

Q Can you recall if there was an examination in September of 1969?

A By the New York Stock Exchange.

Q All right, I am sorry. I mean first to refer to the New York Stock Exchange examination.

A Yes.

Q Did the New York Stock Exchange examine the records of Newburger, Loeb in September of 1969?

A Approximately.

Q And was there also an examination by Peat Marwick some time in November of 1969?

A Yes, I believe so.

Q Is that November 1969 examination a so-called surprise audit?

A I think the stock exchange was the surprise audit.

Q All right.

THE COURT: The stock exchange?

MR. SHAW: Pardon me?

THE COURT: You say the stock exchange?

MR. SHAW: Yes.

THE WITNESS: The September examination.

Q How did the examination in September of 1969 relate to, if it did, the operations department? What was done?

A Well, the firm had sent in a questionnaire sometime during that summer stating shortages and conditions of the back office. Generally, after one of those questionnaires, whether it be six months later, two months later, whichever it is, an auditor comes in from the Exchange to verify the authenticity of that questionnaire.

When we were audited in September, I believe that the last questionnaire that Newburger, Loeb filled out and the findings of the examiner were about three miles apart.

Q What do you mean by that, sir?

A Well, I think the questionnaire referred to specific differences, in our ledgers of one or two and John came in and found a thousand.

Q Are you referring to John Wagnes?

A Yes.

Q By specific differences do you mean so-called breaks?

A Yes.

Q Would you describe what a break is?

A Well, if you owe out 14 shares of stock, and you have owed to you 14 shares of stock, you are in balance. If you owed out 14 shares of stock and have owed to you ten, and don't have four on hand, you have a break. You are minus four shares. That could also work the other way. If you are over four shares, that is also a break.

Q Did you have any conversations at or about the time of this audit in September of 1969 with Mr. Gross?

A I had a lot of conversations with Mr. Gross.

Q Will you tell the Court the substance of these conversations at that time?

A Be more specific.

Q In September of 1969, with respect to the audit.

A Well, we did a count. The first serious conversations I had with Charley were during the count when the amount of differences reached enormous levels. All right, I stated at that time that I told Mr. Gross that our losses would result in approximately two to three million dollars, because of the condition of our back office.

Q Was there any further conversation?

A As regards to the breaks?

Q Yes.

A Every day.

Q Every day?

A Every day.

Q During what period of time?

A Until approximately April of the following year when we got down to a point where we were clear.

Q April of 1970, correct?

A Yes.

Q At or about the time that you had this conversation with Mr. Gross in September of 1969, was he the managing partner of Newburger, Loeb?

A I think he was at the time we were talking.

Q Thereafter, did Newburger, Loeb, to your knowledge, do various things in an attempt to rectify or correct the situation?

A Yes.

Q What was the first step that you can recall that you were familiar with?

A We put a crew working on nothing but the breaks. Not every difference that shows up is a meaningful difference. Some of them are account number errors, some of them are security errors.

Q Was there, to your knowledge, an effort made to acquire new capital?

A Yes.

Q And were you involved in that in any way?

A Very small.

Q Did you make a trip?

A Yes.

Q Was that trip to California?

A Yes.

Q In the course of that trip, who did you meet with?

A Kayne and Sloane.

Q Prior to leaving for California when you met Kayne and Sloane, did you have a conversation with Mr. Gross?

A Yes.

Q May we have the time?

MR. MANDEL: One moment, please. I am going to object to this because it seems to me that Mr. Shaw is going outside the ambit of the pleadings in this case.

MR. SHAW: This relates to the conspiracy, your Honor. It does not relate to the counterclaim. The issue involved specifically with respect to the arbitration of the alleged dispute between Kayne, Sloane, and Gross, and whether that was the basis of arbitration brought to pressure them.

THE COURT: How does this bear on that?

MR. SHAW: Because this is a conversation that Mr. Gross had with the witness before the witness met with Kayne and Sloane. It is also an admission with respect to the condition of the business at that time. It relates to everything that occurs hereafter.

MR. MANDEL: I think that Mr. Shaw is trying to relitigate the arbitration between Kayne and Sloane and--

MR. SHAW: There has been so much testimony on this already, your Honor, that I don't think I should be selective. In addition, there is no jury. If the Court considers it irrelevant, it can just ignore it. It will be very brief.

THE COURT: Mr. Glatzer, what is your position?

MR. GLATZER: Your Honor, I believe I know what Mr. Therese's is going to testify to. It does relate to the foundation of that claim, and I think it does relate to an issue in this case as to whether that claim had any merit or whether the parties believed it had any merit.

MR. SHAW: So there is no objection from your point of view?

THE COURT: From him.

MR. GLATZER: No, I don't object.

THE COURT: I will allow it. Go ahead.

MR. SHAW: Thank you.

Q Tell us what the conversation was, sir.

A I believe at the time we were under restriction or fighting to get off restriction. When you are under restriction, it means you cannot increase your offices or indebtedness, and I was told when I went out to California not to let on to Sloane and Kayne that we had problems with the Stock Exchange.

Q Who told you to do that, sir?

A Charley.

Q Did he tell you to do anything else?

A No, just to let them believe that we were the strong New York stock exchange firm that they were led to believe.

Q And you went out to California?

A Yes.

MR. MANDEL: Can we have a date fixed?

Q When did you go to California, approximately?

A I think it was October.

Q And when did you have the conversation with Mr. Gross that you just referred to in relation to October?

A The day before I left.

Q The day before you left?

A Yes.

Q Was anybody else present?

A Jimmy Settel.

MR. MANDEL: Is this October '69?

MR. SHAW: Yes.

THE WITNESS: Yes.

Q After you returned to New York from California, what else, if anything, was done in an attempt to rectify business conditions at Newburger, Loeb at the time, to your knowledge?

A Well, from my end of it, I worked strictly on cleaning up the back office.

Q Did a time come when you became a partner of Newburger, Loeb?

A Yes.

Q When was that, sir?

A February of '70.

Q And did you become a partner at the same time that Mr. Ed Rubin became a partner?

A Yes.

Q And Mr. Jack Schaffer?

A Yes.

Q How many points did you acquire?

A Two.

Q And how much did those two points cost?

A $50,000.

Q Can you tell the Court what the circumstnaces leading up to your becoming a partner were?

A In regards to--

Q Who spoke with you, what did they say, what was done?

THE COURT: How is this relevant? I think I sustained an objection to this area with somebody else, didn't I?

MR. SHAW: No, it came in on Mr. Rubin, your Honor.

THE COURT: But he was going to testify as to some third person, as I remember.

MR. GRUTMAN: Schaffer?

THE COURT: Schaffer. What is the point of this, gentlemen, getting it from him?

MR. SHAW: This is the representation that was made to this person at that time.

THE COURT: But this is not being litigated here and I will sustain that objection.

Q After you became a partner, did you receive a monthly profit and loss statement?

A No.

Q After you became a partner, were you at any time advised of any trading account being conducted by Mr. Gross for the firm or for anyone's behalf?

A No.

Q When you became a partner, did you have access or did you examine any document which referred to a trading account?

A When you say, did I have access to everything. Did I examine it? No.

Q Did you have access to a financial statement?

A No, but I had access to the controller.

Q What is the controller.

A He prepares the statement.

Q The controller?

A The controller.

Q And were you advised by the controller when you became a partner in February of 1970 anything regarding a trading account being conducted by Mr. Gross in his own behalf or the firm's behalf?

A No.

Q The controller at that time was who, sir?

A John Wagnes.

Q Can you recall the circumstances leading up to the purchase by Newburger, Loeb of an interest in the basketball team?

A Can I recall--

MR. MANDEL: Your Honor, that is not part of this case.

MR. SHAW: Very relevant, your Honor. It is part of this case, and it has been mentioned over and over again.

MR. MANDEL: Which counterclaim?

THE COURT: The basketball team has been mentioned over and over again but not the circumstances leading up to it. How does that become an issue in this case?

MR. SHAW: All right, let me leave that out.

Q What, if anything, did you do with respect to the purchase of the basketball team?

MR. MANDEL: Why is that relevant? There is nothing in the counterclaims about the basketball team.

MR. SHAW: Your Honor, the basketball team has come up in this case on a number of different occasions and it is certainly relevant by virtue of the testimony that has come in in this case; and this leads up to the meeting that the witness had, which is the beginning of the entire chain of events that relates to the involvement of Kayne and Muh and Risher.

MR. GRUTMAN: Excuse me, your Honor, may I have a word with Mr.Shaw?

(Mr. Grutman conferred with Mr. Shaw.)

(Pause.)

MR. SHAW: I will withdraw the question, your Honor.

Q Did there come a time when you attended a meeting with Mr. Gross at the Navarro Hotel?

A Yes.

Q When was that, sir?

A I believe it was August of '70.

Q Who was present?

A Fred Kayne, Chuck Sloane, myself, Charley, Jimmy Settel, Ned Frank.

Q Prior to attending that meeting, had you attended a meeting with Mr. Kayne?

A Yes.

Q Where did that meeting take place?

A Los Angeles.

Q Did you go to Los Angeles for the specific purpose of having that meeting?

A Yes.

Q And who did you go with?

A Ned Frank.

Q Who did you meet with, in addition to Mr. Kayne, if anybody?

A Chuck Sloane.

Q When was that meeting?

A Also in August.

Q Will you tell the Court what transpired, what you said and what they said in the course of that meeting?

A To the best of my recollection, we were in the position at that point that we had to get additional monies into the firm. Charley just couldn't do it, nobody was making any headway in getting any, Jimmy Settel, Ned Frank, and myself, who seemed to be the only people aware of what the hell was going on, decided that somebody should go out to California, level with Kayne and Sloane, and see possibly, because they had somebody on the hook for a half a million dollars, and they were hesitant about bringing him into the situation, that maybe we could convince him that it was worthwhile.

Q When you went to--I am sorry.

A Well, Settel decided and Ned decided that Ned and I would go.

Q In the course of your conversation in California with Mr. Kayne and Mr. Sloane, did you discuss with them anything you had found out or ascertained with respect to the state of affairs of the business of Newburger, Loeb at that time?

A Yes, we were busted.

Q Can you be more precise in what did you discuss?

A We ran out of money. We had payments coming up for the basketball team. We were already jeopardizing our position with customers' securities, and it did not appear that we had any place to turn, other than to get fresh money into the firm.

Q What do you mean by already jeopardizing your position with respect to customers' securities?

A Well, you are only supposed to borrow up to 125 percent of your debit balances. In other words, your customers' securities. So, within the framework of each account, if a customer owes you $10,000, then you have $12,500 worth of stock that you can go and borrow money on. When you get over that number you are in violation.

Q Had that point been reached?

A Yes.

Q In what context had that point been reached?

A Exactly I don't know, but we were far above, past the 125 percent.

Q Did that relate in any way with the basketball team?

A Yes.

Q In what way, sir?

A Well, we had to make committments to the NBA.

Q Yes?

A We had borrowed money from two banks, closed out one bank, borrowed from two additional ones, and we were sending people to Buffalo, to here, to there, you know, to borrow these things.

Q Against what collateral?

A Personal guaranties in some cases and those securities in others.

Q Customers' securities?

A Yes.

Q Was this discussed with Mr. Kayne?

A Yes.

Q Was there any further conversation between you and Mr.Kayne and Sloane when you went out to California?

A Yes.

Q What was said?

A In Fred's own words, the only way he would get involved and come back would be if he could run the firm.

Q Can you recall if on this occasion anything was discussed with respect to a so-called trading account?

A No.

Q As a result of this meeting in California, did Mr. Kayne or Mr. Sloane say that they would do anything?

A Yes, they were going to come to New York, Fred wanted some time to put things in order out there, sit down with Jimmy Settel and Ed and myself, whoever he had involved, and see what they could do with it.

Q And in the course of this meeting in California did Mr. Settel say anything with respect to--

A Mr. Settel was not there.

Q I am sorry. Mr. Settel attended the meeting at the hotel, correct?

A Yes.

Q And have you told us in substance what was discussed in California?

A Yes.

Q How soon after you returned to New York from California did you attend the meeting at the Hotel Navarro?

A Couple of weeks.

Q And will you tell the Court what the substance of that meeting was? What was discussed?

A Well, it turned out to be pretty much a one on one meeting but in substance we had a chance to bail ourselves out; Fred being able to produce some capital and bring on some salesmen who would produce income, but only if it could be done his way, and Charley resign.

I think it was agreed that they--I don't remember the exact, you know, numbers or word for word, but they offered Charley a chance to recoup most of what he had lost over a period of time, they asked him to remain to announce Freddy as the managing partner, and sway the other general partners into accepting Freddy. In other words, making the transition palatable, and at that meeting Charley agreed to that.

THE COURT: You said they gave Charley a chance to recoup what he had lost?

THE WITNESS: Well, in other words, there was no monies to be given to anybody at that stage. Okay? And if Charley just--if things stayed just the way they were, the firm was going to go bust and we would all lose what we put in anyway, but if they could salvage the firm over a period of time they would make up to Charley certain dollars that he had invested into the firm.

Q Was that discussed in any specific detail with respect to manner of payment, period of time, how much?

A Yes, but it was--I had no part--I was not even paying attention.

Q Was it all cash, do you recall?

A No, I don't.

Q Was there any conversation with respect to any paper?

A The word was mentioned.

Q And was part of the deal to be paper as well as cash?

THE COURT: Now, Mr.Shaw--

MR. SHAW: I will withdraw it, your Honor.

THE COURT: It is all leading.

MR. SHAW: I am sorry, your Honor.

Q Was anything said on this occasion with respect to any possibility for there to be a recoupment of the investment of either Mabel Bleich or Jeanne Donoghue?

A Not to my knowledge.

Q And was there anything said at this meeting with respect to the state of the affairs of Newburger, Loeb at that time?

MR. MANDEL: I am going to move to strike all of this, your Honor. It has nothing to do with the issues of this case. It is wasteful of time.

THE COURT: Well, it is in, and I will let it stand.

Go ahead.

Q Was there anything--there has already been testimony on this--

THE COURT: Go ahead, Mr. Shaw.

Q Was there anything said at this point with respect to the business conditions of Newburger, Loeb and what any specific causes of the conditions were?

A Yes, they went through the whole rigamarole, the basketball team, the trading accounts, the so-called fraud that you know they claimed that Charley pulled on them. Everything they--

Q Pulled on who?

A On Fred and Chuck.

Q And what did Mr. Gross say, if anything?

A They talked it out like gentlemen; there was no screaming or hollering or physicals or anything. And I just really didn't get into it.

Q And Mr. Gross agreed to resign, correct?

MR. MANDEL: I object.

MR. SHAW: All right.

Q Was there any period of time or any time schedule discussed with respect to his resignation?

A The end of the year.

Q He was going to stay there until the end of the year?

A Yes.

Q Was there any time schedule discussed with respect to when he would withdraw, if he was to withdraw, as managing partner?

A It was, and it was going to be pretty quick. Charley did not feel like staying around like a lame duck.

Q Thereafter did you do anything with respect to trying to aide the business of Newburger, Loeb, try to save the business?

A Yes, I went out with Paul Risher and got the agreement signed that took us non-clearing.

Q Did there come a time when you resigned?

A Yes.

Q When was that?

A Either October or November of the same year.

Q Thereafter, did you go forward with the transfer agreement?

A No.

Q Did you participate in the transfer agreement in any way?

A No.

Q Thereafter, were you employed by Newberger, Loeb Corporation?

A Yes.

Q You were a withdrawn general partner, correct?

A Yes.

Q How long were you employed by the corporation?

A I think until about April of '72.

Q Since April of 1972 have you had any contact with the corporation, other than coming into court and testifying today?

A I appeared as a witness in an arbitration.

Q Other than that, have you had any connection or contact with the corporation since that date?

A No, I don't believe so.

MR. SHAW: No further questions.

CROSS EXAMINATION BY MR. GRUTMAN:

Q At the meeting at the Hotel Navarro, which you attended, was there any discussion as to the responsibility for the plight of the firm?

A Yes.

Q What was said in that connection?

A Well, this is where we are now, you know, this is where we were then. I don't think anybody blamed Charley for the condition of the firm. I think that the question arose--the question at point then was there does not seem to be--he is not making any headway in getting out from under it, I can, you are not, and you won't, and we are going to die, but maybe I can salvage this.

Q Did Mr. Gross acknowledge that if the present state of affairs continued the firm would go bankrupt?

A Yes.

Q There was some discussion, you told us, about relating to a plan whereby Mr. Gross could recoup or get some cash, is that correct?

A Yes, but don't quote me the cash. In other words, where do I stand with the monies that I put into the firm and discussion was made as to how he would salvage that money.

Q And did Mr. Gross make some proposals about what he thought was in his best--

A They talked back and forth.

Q And Mr. Gross made some proposals?

A Yes.

Q What was the proposal that Mr. Gross suggested as you recall it? You don't remember?

A No, I did not pay that much attention at that point because the damage was already done. The hard part was getting Charley, you know, to accept it.

Q What did Mr. Settel say?

A Hardly anything.

Q Do you recollect whether the New York Plaza lease problem was discussed at this Hotel Navarro meeting?

A Yes, yes it was.

Q Do you recollect what was said about that?

A No, it was just one of the things brought up.

Q Was there any discussion about the possibility of buying out of the lease or being bought out of the lease?

A Yes, but I don't--I am not--we had so many discussions on that, and I heard about it so many times I am not sure that that was pertinent at that meeting.

Q At the end of that meeting did Mr. Gross make a committment to remain in the firm until the end of the year?

A Yes.

Q Was there any discussion at this meeting about the New York Stock Exchange censure?

A Yes.

Q What was said?

A Just another one of the things mentioned as part of it, you know, the mismanagement aspect of it.

Q Did Mr. Gross accept responsibility for the censure?

THE COURT: No, sustained as to form.

Q What did Mr. Gross say about his responsibility, if any, for the censure?

A I don't recall.

MR. GRUTMAN: No further questions.

CROSS EXAMINATION BY MR. GLATZER:

Q Mr. Therese, you testified that at the meeting in California with Mr. Kayne, Mr. Sloane, yourself, and Mr. Frank, Mr. Kayne said that he would only come to New York if he became the managing partner or--

THE COURT: Just a minute, Mr. Glatzer. I want to be sure I got an answer down here in my notes.

(Record read.)

Q Mr. Therese, at the meeting in California with you and Mr. Frank and Mr. Kayne and Mr. Sloane, do you recall how the discussion about Mr. Kayne's coming to New York came up?

A What we went there for.

Q You went there to propose that he come back to New York?

A That is the way we went there, to let him know how bad off we were, so that if he was holding back on bringing some money into the firm, he was only doing himself a disservice.

Q What did he say?

A Well, out of that came the only way he would get involved and give a total committment was if he ran the firm.

Q Was there any other talk about an investor a specific investor by name or--

A There was a lot of talk but that is the substance of the conversation.

Q I am just trying to get, was it your suggestion or his suggestion that he come back to New York?

A His.

Q In the first place?

A Yes.

Q That would be the only way that he would get involved?

A Yes. It would be a total committment on his part or no committment at all.

Q And the committment was to do what?

A To run the firm. He will go ahead and try and dig up capital, he will try and generate income from people he would bring in.

Q Try to make the firm a success?

A Yes.

MR. GLATZER: I have no further questions.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Therese, how long had you been with Newburger, Loeb?

A At which time.

Q When Mr. Gross joined the firm.

A I don't know if Charlie came before me or we came together or I was there before him.

Q Mr. Gross came at the beginning of 1969.

A So did I.

Q You immediately went into operations?

A Into the margin department.

Q And at that moment, was there already a big back office mess?

A Oh, sure.

Q And --

A Are you asking me if that was officially a big back office mess?

Q I am asking about the fact.

A The place was a zoo, yes.

Q And the records were in confusion?

A There weren't any.

Q There were no records?

A There weren't any.

Q Going back how far?

A Well, I think the way it was put to me is they hadn't been able to count the box, which means officially count your stock, I don't know, two years, three years, which is absolutely ridiculous; but it was a mess.

Q And that situation existed before Mr. Gross --

A Absolutely.

Q -- joined the firm in any capacity?

A I am sure.

Q Do you know when Mr. Gross became managing partner?

A Well, from my end of it, my conversations with Charlie, to all intents and purposes he was the managing partner in March. I know he was not officially. Sometime during that year he officially became managing partner.

Q You don't know when?

A Well, I think it was at the time when Charlie found out just how bad a screwing he got.

Q Just how bad what?

A A screwing he got.

Q From whom did Mr. Gross get this bad screwing?

A Newburger, Loeb.

Q In what way?

A Well, I think he was led to believe that the conditions were a little different than they were.

Q Mr. Gross himself did not operate in the operations area -- I don't mean to make a pun -- is that correct?

A Yes.

Q Who were the partners in charge of operations?

A I think Andy Newburger and Julie Schnall.

Q Is that it?

A I think that is it. I think I have seen that name around.

Q How about Robert Stern? What did he do?

A That was Charlie's doing.

Q Pardon?

A That was Charlie's doing, Robert Stern.

Q That was Charlie's doing?

A Yes.

Q What was Robert Stern's job, Mr. Therese?

A I really don't know.

Q How about Richard Stern?

A Richard's?

Q Richard Stern.

A Richard Stern? I think he was in personnel at the time.

Q Actually, did you become aware that Mr. Gross had never had any operations experience of any kind running a back office before he joined Newburger, Loeb?

A Had I become aware?

Q Did you know that?

A Well, if you were in the position that I was in, you would have understood that none of them had anything to do with operations.

Q At least the Newburgers and some of the others had been with a clearing firm for years, ostensibly doing an operations job, right?

A If you say so.

Q But you knew, didn't you, that Mr. Gross, until 1969, at Gross & Company, which was a non-clearing house located on the premises of Newburger, Loeb & Company, is that right?

A Yes.

Q You knew that. And there was no secret about the fact that Mr. Gross knew nothing about operations and had no background in it?

A No.

Q If I am correct, is that what you mean to say?

A Yes, you are correct, it was no secret.

Q And Mr. Gross' capacity and job was at least before he became managing partner was in the area of generating income, is that correct?

A Yes.

Q Was the firm on restrictions when Gross joined it and you came there in the first part of 1969?

A I don't know.

Q What?

A I don't know. I wouldn't have been privy to that at that point.

Q You don't know?

A No.

Q In other words, whether a firm is on restrictions or not is a private matter?

A Generally, yes. It depends how badly on restrictions they are, if they publish it or not.

Q If it has not been published by the New York Stock Exchange, then it is a private matter to be protected by the firm?

A Yes.

Q And even you as a person, trusted person in operations, would not have been privy to the existence of restrictions at the beginning of '69, is that right?

A Yes.

Q Now you told us that you were sent out to talk to Sloane and Kayne, when was it, in October of 1969?

A October, September, in that time.

Q September of 1969; and the purpose of your going out there at that time was to persuade them to become registered representatives, right?

A No.

That is not what I said.

Q No?

A I believe the deal was already shaking hands on, okay, that they were going to join the firm. They had some questions as to how to clear out-of-town trades, and how to process, you know, normal transactions out there that they were doing on the Pacific Coast Stock Exchange, and it was felt that Eddy Rubin, who was in charge of the order room, and myself who was in charge of the back office, would be the two proper people to go out and give them help if we could.

Q Isn't it true that you went to California in December to set up those procedures and not September?

A That is possible.

It is only one trip that I made, and it is the trip with Eddy Rubin at the time just before they joined us. It may have been December.

Q And was the firm on restrictions then?

A Yes.

Q You knew it?

A Yes.

Q Right?

A Yes.

Q You say Mr. Gross told you not to tell them about the restrictions?

A Yes.

Q When did the firm get off restriction?

A Just about the time we opened the branch officially. I think we just made it.

Q Which was just when?

A I don't know, February, April around that time. They had a grand opening. I think it was April 1st.

Q Do you know whether Kayne and Sloane joined the firm while still on restriction?

A No.

Q You don't know?

A No. I don't know when they shook hands on the deal.

Q Do you know whether Kayne and Sloane joined the partnership at the same time you did? Is that right?

A We joined the partnership at the same time but they were already processing transactins before they were partners.

Q As employees?

A Yes.

Q I am talking about their becoming partners, Mr. Therese.

Now, you became a partner in February of '70, right?

A Yes.

Q And at the same time, Rubin and Shaffer and Kayne and Sloane became partners?

A And Joe Searles.

Q And Joe Searles.

And was the firm still on restrictions?

A It might have been.

Q You don't know one way or the other?

A No, it is in that time. They had given us a deadline and he had given us a schedule to meet as far as reducing our breaks were concerned.

Q When you say they you mean the New York Stock Exchange?

A New York Stock Exchange.

Q And did you let all these other people come into the firm without knowing about the restrictions?

A Did I let them come into the firm?

Q Yes.

A Yes.

Q You knew about the restrictions?

A Yes.

Q Right?

A Yes.

Q It didn't matter to you?

A No.

Q Because either the restrictions were off or they were about to be lifted, right?

A As far as I was concerned, yes.

Q How about Searles? His name has been mentioned. Maybe we should clear that up. Searles.

A You are asking the wrong person.

Q What?

A You are asking the wrong person.

Q He was the first?

THE COURT: He hasn't asked yet.

Q He was the first black partner of a New York Stock Exchange firm, is that right?

A I guess so.

Q Did you have any dealings with him?

A No.

Q You don't know whether he knew about these restrictions if there were restrictions or not?

A No.

Q How about Shaffer?

You don't know one way or the other?

A No, but Jack Shaffer was with the firm about four years, I think. I think he knew everything that went on one way or the other.

Q Despite what you knew about the firm's position at that time, you wanted more than one point, right?

A Yes.

Q You demanded two and got two?

A Yes.

Q With everything you knew about the firm, you still thought it was a good deal?

A Yes.

Q Yes, to exactly what you said with everything I knew, yes.

Q Do you say there were things you didn't know?

A Yes.

Q What?

A I didn't know that the other partners in the firm were not paying $25,000 for their points.

Q Which partners?

A Where do you want to start?

Q You tell me.

A Andy Newburger, Bob Newburger, Bob Stern, Leo Stern, Julie Schnall, whoever. They had deficit capital; but the losses of the prior year had not been subtracted from their accounts. So in effect, the only partners

partners outside of Charlie was myself and the new ones that officially had dollars up there and didn't have any losses against them.

Q Well, I am not -- I am not here trying to justify those general partners, Mr. Therese.

A I am answering your question.

Q But they owed the money.

A Yes.

Q And though it was not on hand, they eventually paid back a substantial part of it, right?

A I don't know.

Q I think Mr. Shaw asked you questions about secret trading. Now, as of today, Mr. Therese, is it your testimony that you know something about secret trading Charlie Gross was doing?

A How do I answer that?

Q You have to tell me, Mr. Therese.

A I learned at the same time everybody else learned about the City Investing account. I was not aware of it prior to their being a large position in the account.

Q When did you find out about the City Investing?

A Sometime during 1970.

Q When?

A I would say after April.

Q After April?

A Yes.

Q When did the City Investing start?

A I don't know.

Q You don't know as of today?

A No. I learned more about it sitting back there when you talked to Eddie Rubin than I knew when I was with the firm.

Q Do you know whether the executive committee knew about Mr. Gross' trading activities?

A No.

Q You don't know, right?

A I don't know.

Q It was the executive committee that was in fact charged with running the business, is that correct?

A Yes.

Q As an experienced person in Wall Street, would you agree with me that there could be very good legitimate reasons for keeping knowledge about a firm's block accumulation or trading activities restricted say to the executive committee?

A I guess so.

MR. GRUTMAN: I object to that question, your Honor. There is no proof that the executive committee knew about it or authorized it. The only basis on which the question can be asked is if that is the fact and I make a representation that there is no proof of that and can be none.

We have the minutes. It is not there.

MR. MANDEL: Wait a minute.

MR. SHAW: I say represent as well, your Honor.

THE COURT: Mr. Mandel, what say you to that?

MR. MANDEL: I say that the proof will come this witness was brought in to say that he didn't know and I think I am entitled to ask him if it would not be proper for him to be kept from the knowledge if the executive committee knew.

THE COURT: Under certain circumstances.

MR. MANDEL: Yes.

THE COURT: I will take it for that purpose.

MR. GRUTMAN: I think your Honor should understand that the legal position that I am advocating is that there is no proof that the executive committee knew.

THE COURT: I understand that.

MR. GRUTMAN: It was so secret it was secret from them.

THE COURT: There is a dispute that the position you are taking factually I understand .

MR. MANDEL: Yes. I don't think they have put in any evidence that the executive committee didn't know. There has been nobody here from the executive committee, and so far we have inference and innuendo. We are prepared --

THE COURT: All right, I will take this proof. Go ahead.

Q During 1969, do you know whether monthly statements were generated internally by the firm for internal use?

A For internal use?

Q Yes.

A You are talking about customer accounts?

Q No, no. I am talking about -- let me put it another way.

Are you aware that beginning early in 1970, monthly statements of the firm's operations and results were being produced for internal use?

A Yes.

Q Who prepared those monthly statements?

A The controller.

Q And what was his name, Wagnes?

A Yes.

Q And did you see those monthly statements?

A No.

Q You know that they were distributed to the executive committee, is that correct?

A No.

Q What is the fact? What is your knowledge about what Wagnes did with the monthly statements?

A Well, I know when you say monthly statements, a monthly statement to me as a margin clerk is a picture of everything that took place that month. It is very simple to do on a customer's account because you have machines you know printing the information every day. When you talk about a general ledger account you talk about a person or people sitting down and correlating a lot of numbers and producing information. I never saw a statement producing that information.

Q Did you know -- I am not talking about a ledger account for the firm. I am talking about an overall financial operating statement for the firm for the month to show profits and losses.

Did you know that Wagnes was doing that month by month in 1970?

A To my knowledge, the first one that -- the first information we had heard, and I don't recall the month, but there was one particular syndicate that we participated in that we made some money on, and there was some discussion amongst the partners as to whether or not the new partners should share in the profit. Okay? So I have to assume that it was probably the month of February.

THE COURT: No, Mr. Therese. The question to you is directed to these monthly overall operating statements, and what extent you knew of them and what they consisted of and who they went in? That is what we are talking about.

A That is what I am answering. I never saw one or heard of one until April, and that reflected either January or February.

THE COURT: All right, that is an answer.

Q In April you saw a statement?

A Heard of one.

Q Heard of one?

A Still never saw one.

Q From whom did you hear about that April statement?

A Charlie.

Q When did he tell you about it?

A It was nnot the April statement.

Q January, February or March?

A January or February, whatever month that syndicate cleared.

Q Which syndicate was?

A I don't recall the name of it now, but it was a syndicate that we had done very well on, and there was conversation as to whether or not the new partners should share in that profit, and that conversation took place until we found out there wasn't a profit to participate in but a loss. That ended the conversation.

THE COURT: How does this tie in with this operating statement?

THE WITNESS: That is it, I have never seen an operating statement, but the first one to my knowledge would have been that month, and I don't recall what month that was, either January or February.

Q You say you had access to the controller, is that right?

A Yes.

Q Wagnes was a friend of yours?

A Well, we lived in the same area so we drove back and forth together.

Q And you had good relations?

A Yes.

Q Did you ever speak to him about alleged secret trading that Gross was doing?

A No.

Q No?

A No.

Q You never asked him any questions and he never told you anything, right?

A Well, what John used to tell me is I was out of my mind to become a partner.

Q What did you say to him when he told you that?

A What did I say? Obviously I must have been out of my mind.

Q Did you ever hear anything about anybody say that Gross improperly did something about Tyco and kept that secret?

A Well Tyco warrants were a subject of conversation but I don't recall.

Q You don't recall anybody?

A I recall Tyco warrants being spoken about.

Q That is all you know about it?

A Yes, again that was something that should not have pertained to the new partners.

Q You said there was a Stock Exchange surprise audit in September of '69, is that right?

A Yes.

Q And a Peat, Marwich surprise audit in November of '69, is that right?

A I don't know if Peat, Marwick's was a surprise audit.

Q Well, am I wrong? Isn't it the custom of the New York Stock Exchange to have the auditors do surprise audits, not the Exchange's audit but the audit of the outside auditors? Isn't that the custom?

A Yes, but that is like a surprise birthday party for your daughter.

Q You think that the custom is for the brokerage houses to know somehow in advance?

A Well, if you have to get audited once a year and it is November and they haven't bee there yet, it is not much of a surprise.

Q Did you ever see the result of the Peat, Marwick audit done in 1969?

A Yes.

Q Yes?

Q Do you remember whether it showed the position in Tyco?

A No.

Q Do you know whether the New York Stock Exchange surprise audit turned up any unauthorized trading being done by Gross?

A Well, if it didn't it is the only thing it missed.

Q As far as you know, nothing like that turned up?

A It wouldn't have been discussed with me at that point, at the point Wagnes came in.

Q You said you had access to everything; is that right?

A Yes.

Q And any time you wanted to look at any kind of financial information regarding the firm, you would be able to do that?

A Yes.

Q You just never wanted to do it?

A No.

Q The basketball team, since we spoke about it, that is nothing that Charlie Gross did by himself, just ran away with, was it?

A Well, if you believe what you hear, yes, it was.

Q Do you know?

As far as you know did other people --

A As far as I know, the basketball team was bought without 'body asking me for permission. I don't know who voted on it, but I never did.

Q You don't have any idea whether the executive committee approved it and other people approved it?

A No.

Q You don't contend that it was done for any sinister motive, do you, Gross --

A Sinister motive?

Q Yes, Gross and whoever did it expected to make money out of it, right, for the firm?

A Yes.

Q And it was just an idea that didn't work out, right?

A Yes.

Q And as far as you are concerned if the executive committee approved it, though it was unfortunate, it was legitimate, right?

A No.

Q Why?

A Because the executive committee was a joke, and Charlie knew that. The executive committee was a tool for Charlie when he wanted it to be a tool, and it was a place to hang his hat when he wanted it to be that, so that is not a fair evaluation. If Charlie wanted to paint the walls of the place yellow and green the executive committee would have said yes.

Q Are you saying that in your opinion, the way things worked out in practice, Mr. Gross could assume he had the executive committee's consent for anything he wanted to do?

A Yes.

Q And if he asked the executive committee to sign it or make a minute of it, they would do it?

A They wouldn't dare tell him no.

Q And why was that? Was it force of personality?

A No, but I think that sometime during the December evaluation of the audit with Peat, Marwick, Charlie realized that he was taken, and Charlie's whole outlook on the firm became different.

Q Are you aware that Mr. Gross put close to $400,000 of additional capital into the firm in the first six months of 1970?

A Is that the seat?

Q I am talking about money, no matter where it came from. Are you aware of the fact?

A If it is the seat, yes.

Q Yes?

A Yes.

Q So that at least to that extent will you agree with me, Mr. Therese, that Mr. Gross was trying to help the firm and had some hope for its future?

A I would agree he was trying to help the firm, yes.

Q And he did this at a time when other general partners were in deficit, right?

A Well, you are asking me as if the man reached out and took $400,000 and handed it to somebody. I don't think that is what happened.

Q Well, he sold the seat to the firm, is that right?

A And what did the firm pay him with? Another general ledger entry.

Q Right.

A Okay. That is different than bringing in cash.

Q But the seat had a value, right?

A Yes.

Q And Mr. Gross could have sold the seat to somebody else, not to the firm, and had the cash, right?

A For how much?

Q For the same price.

A For the same price as he sold it to the firm?

Q Right, right, there was a market value.

A I don't believe so.

Q Don't you know there was a market value for seats at all times?

A Yes, but I don't think it was the price that the firm paid him for the seat.

Q How was the price fixed, if you know?

A It was fixed in some agreement made between

between Charlie and the partners.

Q Isn't that governed by the Stock Exchange rules and an ABC agreement?

MR. GRUTMAN: That, your Honor, is the censure that you ruled out.

A I don't know.

Q Can you answer my question, Mr. Therese?

A I can't. I don't know.

Q Did Mr. Gross make efforts, during the time you were in operations, to get the general partners to make up their deficits?

A Yes.

Q Was he sincere and serious about that?

A Absolutely.

Q And you knew about it, right?

A The whole building knew about it.

Q The whole building knew about it?

A Yes.

Q So there was no secret about that?

A No.

Q So that if, as you say, the firm's capital was dissipated by the deficit of the general partners, Gross was not trying to keep that as a secret from anybody, was he?

A At what point?

Q At any point?

A I believe he kept it a secret from me.

Q When did you find out about it?

A After I had put up my $50,000. There is no way I would have went out and borrowed $50,000 to buy two points when Andy Newburger had 10 points and had peanuts. No way.

Q Did you have any discussion with Mr. Gross --

A Originally --

Q -- about the status of the accounts of the general partners?

A Yes, and Charlie told me that originally I was going to be a partner on merit. He didn't care if I put up $14 but I had to do something. Okay? After that, the valuation of Peat, Marwick, it became the point system, and he told me that Andy Newburger was going to go, I think, from 17 per cent down to 10 per cent because that is all he could afford.

What he didn't tell me is there wasn't even $200,000 there for the 10 per cent or whatever. There was nothing.

Q Well --

A Again, the only people who had properly paid for their points was Charlie and the new partners.

Q The time came when you decided Gross was not effective enough or militant enough, right?

A Yes.

Q And you were in contact with Ned Frank, right?

A Well, yes, but everybody was.

Q Is it fair to say that Ned was a somewhat excitable and intemperate person, not balanced?

MR. GRUTMAN: I object to speaking ill of the dead in that way. I knew the man. He wasn't unbalanced.

MR. MANDEL: That is the new rules of evidence.

MR. GRUTMAN: Well, Judge he wasn't unbalanced, and I think Mr. Mandel knows that.

MR. MANDEL: Mr. Grutman, you really have nothing to do with this, Mr. Grutman.

MR. GRUTMAN: He was my friend.

MR. SHAW: We might use that.

THE COURT: What was the question?

Q Was it fair to say that?

MR. GRUTMAN: I don't think this is funny.

Q -- that Ned Frank --

A Why don't you ask Charlie to answer that question?

Q No, Mr. Therese, you are the witness. Is it fair to say that Ned Frank was excitable and hotheaded and not always calm in his judgments?

A I think that is fair to say.

Q And is it fair to say that he was very extreme in his dislike of Charlie Gross?

A No. I don't think that is fair to say.

Q You don't think he disliked Gross?

A No, Ned could dislike you on Monday and love you on Tuesday. But I think he treated everybody that way.

Q He was a little more consistent with Mr. Gross, wasn't he, Mr. Therese?

A He would know better than I would. At one point he was the greatest thing since canned beer, but he was subject to change; but I don't think anybody placed any specific emphasis on anything that Ned said.

Q Did there come a time when Mr. Kayne told you that he was going to buy -- take over the business for a new corporation?

A Oh, I think there was no secret about that at the time we confronted Charlie.

Q Which was in August?

A Yes. Approximately. Again I was wrong three months on when we went to California. I don't think I am more than a month off on August.

Q What did Mr. Kayne say about his plan to take over the firm for a new corporation?

A When you say plan, okay, at the time in August the most important thing at that point was bailing the firm out so there would be a new corporation. That is what the discussion was then. When Charlie resigned and disappeared from the picture, Freddie sat down with all the general partners that were there, okay? There was discussions of incorporation, there was no discussion at that point of, you know, getting rid of everybody in the firm. Not at all. Not at that point, if that is what you are asking me.

Q Do you recall that Mr. Kayne's first plan was to form a corporation to buy the name and some of the assets and leave the partnership to itself?

A No, this would be probably after my involvement. Remember, August we confronted Charlie. October or November I resigned.

Q Did you resign at the same time as anybody else, Mr. Therese?

A I don't think so.

Q Do you know when Fred Kayne resigned?

A I think a month before me, a month before me or a month after me.

Q And when did Sloane resign?

A I don't know.

Q And when did Ned Frank resign?

A I don't know. Once Fred Kayne said, "I can't go this route any more," and decided to go back to California, I was a lame duck in the firm. So there was no sense in me participating.

Q Once Fred Kayne resigned, a whole bunch resigned right almost simultaneously?

A I don't know. I think the month I resigned I think I was by myself, or the day. Maybe all resignations were official at the end of the month.

Q Yes.

A I was not a party to anything other than my own decision.

Q But you knew Kayne had submitted his resignation and Sloane, simultaneously?

A I knew Kayne did. I didn't even know Chuck resigned.

Q How about Frank?

A I don't know.

Q You don't know whether that was before or after?

A I don't think I cared either.

Q Why wouldn't you care about Frank's resignation?

A It didn't mean anything.

Q Kayne said he was going to get capital, right?

A Yes.

Q In fact he never did raise any capital until February of '71, is that right?

A You sound like it is.

Q I think your statement was that when you went out there in August, the firm couldn't even go on for weeks, that is the way it looked to you, right?

A Yes.

Q But in fact the firm did go on until February of '71; it didn't collapse in the meanwhile?

A No, but that is because a complete, you know, plan --

Q Certain things were done?

A Yes, but it was also leveled with the Stock Exchange. Freddie's first action was to call the New York Stock Exchange and sit down with them; so the pressure was off us as far as our ratio was concerned.

THE COURT: That did take place.

Q The going out of the clearing, took the pressure off the capital ratio?

A Absolutely, that is all the different in the world, yes.

Q That was the important thing?

A Yes.

Q Selling the basketball team --

A Was very important.

Q Important, and if the general partners had put in their money the firm would have been in fine shape, right?

A I don't think the firm could have remained clearing whether they put the money in or not but it certainly wouldn't have been as,you know, it wouldn't have had to be that quick.

Q And you also knew that all of Wall Street was a disaster area at this time?

THE COURT: That's right, isn't it.

A The street was hurting, yes. The street was hurting.

Q Do you know how many old houses went out of business in 1969 and '70? Many, right?

A Yes.

Q Close to 100. Without help from Charlie Gross and without help from the Newburgers or the Sterns. Right?

A Yes.

Q And without any of the special mismanagement that you have been talking about, right?

A I don't know. Let's put it this way, not too many firms could have existed for any length of time with the records that Newburger, Loeb had.

Q I think it was your testimony or the implication ofit that Gross did everything he could in connection with freeing you to clean up the back office mess?

A Absolutely.

Q Is that right?

A Absolutely.

Q He was cooperative, he didn't like the back office mess any better than you did?

A Unquestionably.

Q You wanted to hire a crew, that was provided, right?

A Yes.

MR. MANDEL: Your Honor, could we suspend at this point?

MR. GRUTMAN: Could we finish?

MR. SHAW: This witness comes in from New Jersey and he is supposed to be going on vacation tomorrow, I understand. That is the reason for all the rush so he could possibly testify this morning and get off the stand today.

THE COURT: How much longer will you be?

MR. SHAW: I only had one question myself. Is five minutes to 5:00 right?

THE COURT: It all depends on how much. I would recess in five minutes in any event.

MR. SHAW: I also understand that he owns his own business and he is the only owner of the business, and nobody is minding the store, in other words, your Honor.

MR. MANDEL: I will conclude now with Mr. Therese.

THE COURT: Mr. Shaw?

MR. SHAW: Are you finished?

MR. MANDEL: Yes.

MR. SHAW: Just one question, Mr. Therese.

REDIRECT EXAMINATION

BY MR. SHAW:

Q I was asking you before what conversation you had with Mr. Gross prior to your becoming a partner. In other words, what the circumstances leading up to that were and I think now the door has been opened.

THE COURT: By what?

MR. SHAW: By virtue of Mr. Mandel's questions.

THE COURT: By what, which question?

MR. GRUTMAN: Who approached you to become a partner and what was said to you and so forth.

MR. SHAW: I believe there were questions on that point, your Honor.

What he knew prior to becoming a partner, the fact that Mr. Wagnes told him he was crazy to become a partner, the fact that he became a partner anyway.

I would like to inquire into what conversations he had with Mr. Gross or any other person prior to becoming a partner, how he became a partner.

THE COURT: No, I will permit you to ask him what he knew and from where he heard it but that is the only door that is opened. Other than that I don't think the door is opened.

Q What did you know regarding the business conditions at Newburger, Loeb prior to your becoming a partner of Newburger, Loeb?

A When you say business conditions, I knew that the firm was in poor shape back-officewise but I felt confident enough that I could remedy that situation. What I didn't know was the stagnant front office that it had. But I had faith in Charlie that Charlie would produce the type of things that he said he would. For example, the California office.

Q What did Charlie tell you he would do?

A Well, we were going to take on a California office. We were going to bring in new management in the New York offices, open several other out-of-town branches, he has always been a, you know, a ball of fire in generating new business and earning money; which may have come to pass had things not been the way they were, but at the time we talked I was going to become a partner for nothing.

Q Yes.

A In other words, I earned it. There was no mention of putting up any money and no mention of points.

Q He told you that originally?

A Yes, yes.

Q When was that in relation to when you became a partner?

A This was like September or October.

Q And thereafter did you speak with Mr. Gross again about becoming a partner?

A Yes, this is when he came up with the points and Charlie and I had an argument.

Q What did he say to you?

A That they were going to have 100 points or 102 points and it was going to be $25,000 a point and he had me down for one point.

Q When was this?

A After the first of the year.

Q And what else was said, if anything?

A Well, at that point one point seemed to be the token; okay? And my feeling was I can't afford one, I can't afford fivem you might as well give me two. Because you are going to have to raise the money for me.

Q You said that to Mr. Gross?

A Yes.

Q And what did he say?

A He arranged the financing, with the First National City for half of it and with Bob Stern for the other half of it.

Q Do you still owe money on this?

A Yes.

Q How much do you --

A I owe approximately $5,000 to the bank and $25,000 to Bob Stern.

MR. SHAW: No further questions.

MR. GRUTMAN: Very few, Mr. Therese.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q You told us that so far as you understood it the executive committee was really a joke, right?

A Yes.

Q You also said that you believed that Mr. Gross had been had by Newburger, Loeb?

A Yes.

Q Did you say he had been screwed?

A Yes.

Q After the surprise audit or the Peat, Marwich audit and Charlie Gross found out about it, you say that Charlie Gross' attitude changed, is that right?

A Absolutely.

Q In what way did his attitude change toward the firm?

A Well, it was now his firm. You know, "You guys put me in this position. Now I am going to get us out of it."

Q Did he say he was going to get us out of it or get himself out of it?

A Well, I am using a figure of speech.

Q Did Mr. Gross try to get himself out of the firm after he thought he had been screwed?

THE COURT: No, no, he said get us out of it and you are turning the question around.

MR. GRUTMAN: He said a figure of speech. I want to know what the "us" means.

THE COURT: Ask him what the "us" means.

Mr. Grutman, please, you have a louder voice than mine and I therefore am swimming upstream at this point. I just feel it inappropriate that when a man has said get us out of it for you to change the question to read get me out of it.

MR. GRUTMAN: I want to find out because I think that the --

THE COURT: Let's ask the man what he means or what was said and not change his answer in the next question.

MR. GRUTMAN: Yes, very well.

Q When Charlie Gross found out that he personally had been screwed by Newburger, Loeb, you say that he felt it was his firm, right?

A Yes.

Q You used the expression he was going to try and get us out of it.

What did you mean by that, insofar as his change of attitude was concerned?

A Well, I don't think it was intended to mean that he was going to bail out, no; at all. I think that it meant was these people sucked me in, I am here now, I am in this far, I am going to do whatever I can do now.

THE COURT: To bail the firm out.

Q Is it the fact, Mr. Therese, that Charlie Gross bailed out before anybody else?

A Yes.

MR. GRUTMAN: No further questions.

He resigned first, your Honor, resigned

before Mr. Therese, Mr. Frank or anybody else.

THE COURT: Yes, I appreciate that and I will accept it that way rather than bailed out before anybody else.

MR. GRUTMAN: That is the way I meant it.

THE COURT: All right.

RECROSS EXAMINATION

BY MR. MANDEL:

Q The fact is, Mr. Therese, Gross resigned after a delegation of partners told him they were not satisfied with his management of the firm and wanted him to resign as managing partner and certain other things happened, is that correct?

A Close.

MR. MANDEL: Nothing further.

MR. SHAW: Just one thing.

BY MR. SHAW:

Q Close, what do you mean by close? Is there anything else that you are omitting? What is the rest of it?

A The genuine feeling was for the best interest of the firm Charlie should not resign at that point but Charlie should do what he could to get the rest of the partners to get up from their duffs and not take six months to realize that we only had one way to go, and that was to back somebody, whether it be, you know, me or him or who else, but they had to do something specific then; and Charlie was needed to make the transition palatable.

Q And he agreed to do certain things, correct?

A Yes, he agreed to help make that transition.

Q Did he perform?

A No.

MR. SHAW: Thank you.

THE COURT: You may step down, sir, thank you. 10:00 o'clock in the morning.

(Adjourned to Wednesday, July 30, 1975 at 10:00 a.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

NEWBURGER, LOEB & CO., INC., as assignee of claims of DAVID BUCKLEY and MARY BUCKLEY,

Plaintiffs.

vs.

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

vs.

NEWBURGER, LOEB & CO., a NEW YORK LIMITED PARTNERSHIP, ANDREW M. NEWBURGER, LEO STERN, ROBERT L. STERN, ET AL.,

Additional Defendants on Counterclaims.

---------------------------------------x

:Before:
:HON. RICHARD OWEN,
: District Judge

: 71 CIVIL 685

U. S. DISTRICT COURT
FILED
NOV 8 1976
S. D. OF N. Y.

New York, July 30, 31, August 1, 1975

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Vol# 47

STENOGRAPHER'S MINUTES

NEWBURGER LOEB, et al.

v. 71 Civ. 685

CHARLES GROSS, et al.

New York, New York
July 30, 1975

- - -

(Trial resumed.)

MR. SHAW: Will you mark this, please.

(Plaintiff's Exhibit number 26 was marked for identification.)

MR. SHAW: Your Honor, Mr. Risher has just handed me a piece of paper, giving the names of certain withdrawn general partners with positive capital positions and the date of their withdrawal.

Now, he advised me that he was asked by Mr. Gross or Mr.Mandel to furnish this information. I cannot recall it, but I would like to state for the record, do you remember being asked to furnish this information?

MR. MANDEL: I asked, I remember asking Therese yesterday if he knew anything about that.

MR. SHAW: No, this happened before that, I believe.

MR. MANDEL: I don't recall it.

MR. SHAW: In any event, will you stipulate that this is correct?

THE COURT: Well, Mr. Mandel, why don't you look

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at it, and after you have had a chance to look at it, we can take it a little later in the morning.

MR. SHAW: In addition, your Honor, I am offering Plaintiff's Exhibit 126 for identification in evidence, and I am showing it to Mr. Mandel. It is a copy of a Geon warrant.

Your Honor, I would like to begin by reading in excerpts from the deposition of Leo Stern.

THE COURT: Leo Stern is deceased.

MR. SHAW: Yes, your Honor.

MR. MANDEL: Your Honor, with regard to this, Leo Stern is a dead party. I am not going to object to the use of his deposition. With regard to the live parties, I will have something to say about that.

THE COURT: Mr. Mandel, while we are on that subject, I did not do an exhaustive job, but through, in Morse, I discovered one or two cases which seem to indicate that a party whose deposition had been taken and was, for example, in California, could have counsel read their own, the deposition was taken by the adversary's party, could have that deposition read on a trial, absent a showing that the person had willfully absented themselves from the jurisdiction.

MR. MANDEL: Yes, your Honor. We had a look, too. There are some cases going both ways. In view of that,

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I do not think your Honor will want to run the risk of an erroneous ruling on that. I would like my objection stated for the record.

I think there are some anomalies that result from a literal interpretation of that rule; if there is ever an occasion on appeal, I think --

THE COURT: You want to preserve your record.

MR. MANDEL: I want to preserve the record.

But with regard to that, I would like to take this moment to point out to your Honor that I do not think that rule means that incompetent evidence can come in because it is in the deposition.

The deposition practice is a search for evidence, and hearsay may be called for by the lawyer taking the deposition; conclusions may be called for.

THE COURT: Well, only objections as to form are customarily reserved for the trial anyway.

MR. MANDEL: That is my point exactly, your Honor. And even the questioning party may have those objections as to the information that emerges.

THE COURT: Very good. Go ahead, Mr. Shaw.

MR. MANDEL: I should also say, your Honor, that as to weight, I think your Honor will recognize that there is a difference between deposition testimony and court testimony and that a party who is in Washington, which is an hour away, who chooses not to come and whose deposition is used instead, creates a situation which the Court can take those facts into consideration in weighing the evidence.

THE COURT: Well, I hear what you say. I am not sure you are right, but I hear what you say.

MR. GRUTMAN: Your Honor, the reporter has suggested that perhaps it would be easier for him to take down if the question were read by one voice and the answer by another, so in that regard I volunteered to read the answers that Mr. Shaw will provide the questions for.

MR. MANDEL: May I make a suggestion, your Honor? After all, there is no jury here, and your Honor probably has a copy before him to read. We can save time by deeming the material in, if I am given a chance to object first. There is no reason to go through a rigmarole here. Your Honor probably reads better than he listens, anyway.

MR. SHAW: This is something Mr. Mandel has consistently not done and I can tell you from my personal experience it makes the record a complete mess.

THE COURT: I think we will do it Mr. Shaw's way, Mr. Mandel.

MR. SHAW: Page 21, line 11:

MR. MANDEL: How far are you going, Mr. Shaw?

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MR. SHAW: At least to around 27.

MR. MANDEL: Give me a moment to, if you will, to look at these to see if I object.

THE COURT: Where are you starting?

MR. SHAW: Line 11 on page 21.

THE COURT: May the record show that Mr. Stern was deposed on January 7, 1972, and that he was duly sworn.

(Pause.)

MR. MANDEL: How far are you going on page 27?

MR. SHAW: To the bottom of the page, line 24.

MR. MANDEL: Your Honor, there are two matters that come up in this testimony.

One, Mr. Stern says --

THE COURT: Why don't you raise the objection when you get there?

MR. MANDEL: To the question?

THE COURT: To the question, when we get there. Then I will have it in context and I won't have to take it separately out of context.

MR. SHAW: May I proceed?

THE COURT: Yes.

BY MR. SHAW (Reading):

"Q As far as you are aware, did Gross, during the entire time he was a partner, commit any wrongs against the partnership?

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"A Yes."

MR. MANDEL: I object to that, your Honor, because it calls for hearsay information. I used the word "aware" rather than personal knowledge, and I think a term comes thereafter that Mr. Stern had no personal knowledge with regard to this alleged speculation, unauthorized speculation.

MR. SHAW: Your Honor, what I am trying to establish through this deposition is that Mr. Leo Stern, who was one of the major forces in the partnership, 16-1/2 percent interest, had been there ever since the firm had been started, practically, had no knowledge whatsoever with respect to Mr. Gross' trading account.

One of the pivotal issues in this case is whether there was any knowledge upon the part of the executive committee with respect to this trading account. That is why the lack of knowledge is relevant.

THE COURT: Let us do this:

To the extent that something requires an absence of knowledge, obviously that is relevant to be stated by him. To the extent that he has secondhand knowledge of something, that is incompetent to prove the fact, and a statement that he had an awareness of wrongs against the partnership while asked in a deposition to explore into what goes on, if it turns out that awareness is not competent proof of any fact, obviously the answer does not prove the fact.

MR. SHAW: It does not prove the fact, however, your Honor.

THE COURT: So I will take it as a statement that he made but it is not proof of any wrong against the partnership.

MR. SHAW: It might be relevant however, to some of the issues, the secondary issues of malicious claims being made against Mr. Gross, etc.

MR. MANDEL: With that understanding, your Honor, I have no objections up to -- page 26.

THE COURT: Let's go.

BY MR. SHAW (Reading):

"Q What were they, sir?

"A He speculated with the firm's money without any consultation with the other partners.

"Q And when did he do this?

"A I don't know. I don't know the exact time.

"Q Approximately when?

"A It was some time during 1970.

"Q After he withdrew as an active partner?

"A No.

"Q Before he withdrew as an active partner?

"A Yes.

"Q While you were on the executive committee?

"A Yes.

"Q Did he also do that after you ceased to be a partner on the executive committee?

"A I don't know dates.

"Q All right. Is it fair for me to say that you know that some of the speculations, as you call them, occurred while you were on the executive committee and that you do not know whether some also occurred after he left the executive committee?

"A Yes.

"Q When did you become aware of these unauthorized speculations, as you claim?

"A I cannot place the date.

"Q Did you become aware of them while you were on the executive committee?

"A No.

"Q You became aware of them after you had left the executive committee, is that correct?

"A Right.

"Q Do you know how you became aware of them?

"A No.

"Q Did somebody tell you or did you discover it from

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the books?

"A One of my partners told me of it.

"Q Which one?

"A I don't know.

"Q Did you discuss this with any other partners?

"A It is possible.

"Q Were these discussions held prior to Gross' withdrawal as an active partner or after his withdrawal as an active partner?

"A I don't know.

"Q Were these discussions with your other partners about Gross' speculations held before the agreement was signed in February of 1971 or after the agreement was signed?

"A Before.

"Q Did you learn of these speculations by November or December of 1970?

"A Before.

"Q Before November or December?

"A Yes."

MR. MANDEL: Are you skpping?

MR. SHAW: Yes, I am skipping.

Page 26, line 5.

MR. MANDEL: Your Honor, I would like the rest of it put in.

THE COURT: You can do that when your turn comes.

BY MR. SHAW (READING):

"Q Other than the speculations you have spoken abcut, were you aware of any other wrongs that Charles Gross committed against the partnership?"

Skipping colloquy.

"A Yes.

"Q Name the other wrongs.

"A He had concluded" --

MR. MANDEL: One moment, please.

As to this material, I object on the ground that it is clearly hearsay and I do not think there is any element of good faith involved in that.

MR. SHAW: Your Honor, it is a combination of the evidence, merely that a statement was made, which is just relative to intent, and also evidence relative to the issue that Leo Stern was not advised that something had occurred; in other words, that the attempt to cancel the lease had been turned down.

So I offer it with respect to Leo Stern's knowledge.

MR. MANDEL: We say that there never was such an

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offer, your Honor. There is no proof of such an offer.

There will be no proof of such an offer except by efforts to get in hearsay.

THE COURT: Mr. Shaw, let me ask about that:

Is there going to be any competent proof on a willingness of the landlord to cancel the lease and pay money to cancel it?

MR. SHAW: The only competent proof that I am aware of is Berkowitz's testimony which Mr. Grutman reminded me of.

What I really had in mind was the Frank affidavit.

THE COURT: Well, the Frank affidavit is not admissible.

MR. SHAW: It has not been offered in evidence yet.

THE COURT: It is not admissible.

MR. GRUTMAN: Your Honor may recall that when Mr. Berkowitz testified, he testified to conversation which he had with Mr. Frank, in which Mr. Frank advised him of the fact that Sol Atlas had offered $100,000 for Newburger Loeb. That is in the record.

THE COURT: That is hearsay.

MR. SHAW: It is hearsay, but it was brought into the record by Mr. Mandel.

THE COURT: It is still hearsay. We have no competent proof in this record of any.

MR. GRUTMAN: Not of the fact; your Honor is correct.

MR. SHAW: Unobjected hearsay is competent proof.

THE COURT: No, I am not going to accept it as such.

MR. GRUTMAN: Your Honor took it not for the fact when you did take it, you took it simply for the fact that it was said, not for the ultimate fact.

THE COURT: If you are not going to prove that there was, what was it $100,000 offer to get out of the lease as I remember it --

MR. GRUTMAN: Yes.

THE COURT: Then it seems to me that Leo Stern's understanding with regard to that --

MR. SHAW: Is only relative with respect to malice or intent or those claims that were made; that would be the only purpose of offering it under those terms, your Honor. I don't think, also, there is any question that Sol Atlas is dead.

Do you stipulate to that?

MR. MANDEL: That's right.

Your Honor, there is an affidavit in this file that Sol Atlas was asked on the summary judgment motion if such a thing ever occurred and he said no, and he said that he would be glad to testify at a trial, and he did not want to volunteer an affidavit.

He died between that date and this.

MR. SHAW: If Mr. Mandel is going to put that in the record, I would like to refer to the Ned Frank affidavit which advises us that this was not true, that Mr. Atlas did say that he had made this offer.

THE COURT: Nothing is competently before me on this subject.

MR. MANDEL: That's right.

THE COURT: Now, what other basis do you say this answer has bearing upon any issue in the case?

MR. GRUTMAN: Only on good faith and the awareness of partners and the assertion of claims agianst Mr. Gross which were not baseless, based upon the state of knowledge possessed by the poeople on whose behalf those claims were presented. I concur with your Honor that no competent proof is available on the ultimate fact, but this is the best evidence which exists that there was such an understanding on the part of the people who charged Mr. Gross with wrongdoing and this is one of the species of wrongdoing.

THE COURT: Let me give consideration to it.

"Stern

Read this in. It is in for no more than the fact that he said it. It is certainly not proof of anything, and it may be I will completely disregard it.

Go ahead, read it.

BY MR. SHAW:

"Q Name the other wrongs.

"A He had concluded a lease arrangement on a building down there and my understanding is that the landlord was willing to cancel the lease, pay us a substantial amount of money for doing it.

"Q And what did Gross do?

"A He turned it down without reporting it to his partners."

MR. SHAW: Skipping to line 4, page 27:

"Q Let us talk about this wrong you have claimed connected with that lease on the new building. Did you know that Gross was going to lease the new building before it was done?

"A Yes.

"Q Did you approve of the lease?

"A Yes.

"Q And the partnership in general approved of making that lease, is that correct?

"A Yes.

"Stern

"Q The problem is not terminating it, that is when you say Gross committed the wrong, is that correct?

"A Yes.

"Q When was it that the landlord made this offer to cancel that you say Gross did not report?

"A I don't know that date.

"Q Approximately, was it in 1970?

"A Yes.

"Q Was it while Gross was still a member of the executive committee?

"A Yes."

MR. SHAW: 54 -- I'm sorry, it begins 51, line 22. And it goes through 55, line 6:

"Q Are there any documents, and I am going back now to your statement that at one time you heard that Charles Gross speculated in an unauthorized way with the funds of the partnership, that is what you told us before, is that right?

"A Yes."

MR. SHAW: Line 12:

"Q Did you receive a report from one of your partners about that?

"A What he had done?

"Q Speculation, that he had speculated.

"A Yes.

"Q And about when did this occur, when did you get the report?

"A (No response.)

"Q Was it while you were still on the executive committee?

"A I don't know because I was only on the executive committee for half of 1970.

"Q Were you on the executive committee during all of 1969?

"A Yes.

"Q You did not get this report in 1969, is that right?

"A That's right.

"Q You got it some time in 1970, is that correct?

"A That is my recollection.

"Q All right. And you got this report while Gross was still an active partner, is that correct?

"A Yes.

"Q And you got this report while Gross was still on the executive committee, is that right?

"A Right.

"Q And promptly when you got the report, you made sure that there was some investigation as to whether it was true or not, is that right?

"A Yes.

"Q And shortly thereafter, you got a report that convinced you that it was true that Gross had speculated with the firm's money?

"A Yes.

"Q For the firm's account, is that right?

"A Right.

"Q This was not a question of his using the firm's account to speculate for his individual profit, this was a question of unauthorized and unwise investments he made for the partnership, is that right?

"A Yes.

"Q Can you recall any of the equities in which he speculated in an unauthorized way?

"A One was City Investing.

"Q Yes, any other?

"A I don't recall the other one. There were two securities involved.

"Q Two securities?

"A Yes.

"Q Do you happen to remember the amount of the losses that the firm suffered in those speculations?

"A I know it was substantial. It went into the hundreds of thousands of dollars.

"Q Can you tell us more than that about the losses?

"A No. Our books would show that.

"Q I take it that when you got the report back it was an easy thing to find out, was it not, it was right there in the books, wasn't it?

"A Yes.

"Q All one of your partners had to do was look is that right?

"A Yes.

MR. SHAW: 87. This has been read already, your Honor, 87.

MR. MANDEL: 87?

MR. SHAW: Right. Lines 11 through 19.

MR. MANDEL: Hold on a second.

MR. SHAW: 90, line 4 through -- this has been read in evidence too.

That concludes Leo Stern.

MR. MANDEL: Your Honor, I have some of Leo Stern's I would like to put in to fill out gaps. Is this the right time to do that?

THE COURT: If you are prepared to do it, yes.

MR. MANDEL: I think I can do that.

I would like to read in -- I think Mr. Shaw stopped

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at 27, line 25. I would like to read page 28. Let me start with 27, line 25:

"Q When the landlord made this offer, was it at a time when you were still a member of the executive committee?

"A Yes.

"Q When did you learn for the first time that the landlord had made this offer to Mr. Gross?

"A I don't know.

"Q How did you learn it?

"A From one of my partners.

"Q You mean that one of your partners told you about this?

"A Yes.

"Q Which partner?

"A I don't know."

MR. SHAW: Is that it?

MR. MANDEL: Yes, I will stop there.

Now, I stopped with page 28, line 14. Mr. Shaw, do you know where you stopped on page 51 or 52?

MR. SHAW: 52, line 3.

MR. MANDEL: I will go on from there.

Line 4:

"Q Did you ever make any effort personally to ascertain whether that allegation was true or false?

"A Personally, no."

MR. MANDEL: I now go to page 55. Am I right that you stopped, Mr. Shaw, on line 5?

MR. SHAW: Yes.

MR. MANDEL: Did you read in the question and answers on lines 3 and 6?

MR. GRUTMAN: Yes.

MR. MANDEL: I will start with line 7:

"Q You are familiar with the books, aren't you?

"A Yes.

"Q So somebody looked and promptly you were told that yes, Gross did this, he speculated in these securities, we think he was not authorized to do it, and we lost some hundreds of thousands of dollars, right?

"A Yes.

"Q What did you do or say then about seeking redress from Gross?

"A Nothing that I know of.

"Q Was the question discussed between you and any other partners?

"A I was not in any discussion that took place about that.

"Q Weren't you interested in whether something would be done about that?

"A Certainly I left that in the hands of my partners.

"Q Did you ever ask them whether they wouldn't do anything?

"A No, I left that in the hands of my partners.

"Q In fact, they did nothing, is that correct?

"A I don't know.

"Q To this day Mr. Stern, you do not know if they ever sued Gross for his speculations?

"A No.

"Q You know they never brought any action against Gross?

"A I don't know."

MR. SHAW: Is that it?

MR. MANDEL: Hold on one second.

That is it.

MR. SHAW: That concludes Stern.

MR. MANDEL: Yes.

MR. GRUTMAN: The next will be Robert Stern.

MR. MANDEL: May we have some page numbers?

MR. SHAW: Just one moment, please.

Robert L. Stern, deposition taken on July 20, 1972, your Honor. Beginning at page 3.

MR. MANDEL: Your Honor, may the record show my continuing objection?

THE COURT: Yes.

MR. SHAW: Page 3, line 7:

"Q Will you please state your present address, Mr. Stern?

"A 4600 South 4 Mile Run Drive, Arlington, Virginia 22204."

MR. SHAW: Skipping to page 4, line 9:

"Q What is your present occupation, Mr. Stern?

"A I am on the staff of the Congressional Committee.

"Q How long were you in the stock brokerage business?

"A Approximately eighteen years.

"Q From when to when?

"A From 1953 to 1971."

MR.SHAW: Skipping to line 25, page 4:

"Q When did you first become a partner of Newburger Loeb & Co.?

"A 1958, to the best of my recollection.

"Q And you were a partner of Newburger Loeb continously from 1958 until 1971, is that correct?

"A That's correct."

MR. SHAW: Page 26, line 5:

"Q Now, getting back to the terms of the history of the negotiation which led ultimately to the agreement,

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transfer agreement of February 11, 1971, about when did a proposal come forth which was not rejected but was taken up for further discussion and negotiation?

"Is my question clear?

"A No.

"Q All right. You have told us that the proposal embodied in Exhibit 78 was rejected.

"A Yes."

MR. SHAW: I assume Mr. Mandel, that we can state for the record that that was the Risher-Muh proposal.

MR. GRUTMAN: First proposal.

MR. SHAW: That that is Exhibit 78.

MR. MANDEL: If you say that, I will take your representation.

MR. SHAW: It is my assumption.

MR. GRUTMAN: It is my recollection.

MR. MANDEL: No, let's get it. Let us find out so that there can be no question.

MR. GRUTMAN: Let us continue in the meanwhile.

"Q That wasn't the end of the matter, was it?

"A It was the end of that matter, yes.

"Q Did subsequent proposals come up?

"A A subsequent proposal for Risher and Muh which I spoke of earlier.

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"Q That came up?

"A Yes.

"Q And was that proposal also rejected?

"A Yes, that was rejected because there was no new capital involved in the proposal.

"Q What happened after that?

"A The partnership attempted to raise more capital unsuccessfully and eventually sat down with the limited partners and discussed with them the plight, the financial plight of the firm. This was occasioned by withdrawal notice from either limited partners or subordinated lenders, I do not recall.

"Q And about when did that meeting take place, to the best of your ability, October, November?

"A I think November or December.

"Q Of 1970?

"A Of 1970."

MR. MANDEL: Are you stopping there?

MR. SHAW: Yes.

42, line 10:

"Q Now, what was your financial position during October, November and December of 1970?

More specifically, did you have a net worth and assets which would have enabled you to pay your capital deficit?

"A No, no.

"Q How did you pay the portion of the capital deficit which you did pay?

"A From tax refunds we received in 1971.

"Q And what was the total of the tax refund which you received in 1971?

"A Something in excess of $400,000.

"Q And the amount you paid was something a little below $300,000?

"A That's correct.

"My return has not been audited as yet. As a matter of fact, they are starting to audit it now. Some of that may be disallowed.

"Q Besides the tax refund and your interest in Newburger,Loeb & Company, did you have any other assets in the fall of 1970?

"A Nothing of particular consequence.

"Q At any time during the negotiations concerning the transfer agreement, did you make any representations as to your ability to pay the amount you owed the firm?

"A Probably.

"Q Were they written or oral?"

MR. SHAW: Colloguy.

"A Let me answer the question this way:

"I am sure there were discussions about ability to pay. We were concerned with trying to keep the partnership alive. The question would have come up certainly and to the best of my recollection there were no written communications on this subject."

MR. SHAW: Skipping.

MR. MANDEL: Excuse me one second.

MR. SHAW: Skipping to line 12:

"Q You do not remember the substance of any statements that you made, if you made any?

"A No, I do not.

MR. SHAW: Page 45, line 25.

78 is the Risher --

MR. MANDEL: The Kayne proposal.

I think we should stipulate that Exhibit 78 for identification referred to in Mr. Stern's testimony is the same as Exhibit --

MR. ESTERMAN: Exhibit S.

MR. ROTHMAN: Which S?

MR. ESTERMAN: Your S.

MR. ROTHMAN: No, the white paper.

MR. GRUTMAN: Whatever it is, that is the proposal to buy some of the assets and let the partnership continue on, all right.

MR. MANDEL: That is correct.

MR. SHAW: Line 25, page 45:

"Q Were you present on February 11, 1971, when the transfer agreement was signed?

"A Yes, I was.

"Q Where did that take place?

"A I believe in the Finley, Kumble office."

MR. SHAW: Line 20:

"Q Were you present at any discussions concerning an opinion letter which Mr. Burak refused to sign?

"A I remember the subject coming up and"--

MR. MANDEL: Excuse me, you are going too fast for me. Were are you now?

MR. GRUTMAN: 46, beginning at line 20. And I am reading the answer commencing at line 22.

MR. MANDEL: How far are you going?

MR. SHAW: Several pages.

"A I remember the subject coming up, that and incidentally, I might say that this meeting was a meeting that was taking place in many offices and many documents being signed in various places. It was not a meeting where everybody sat down in one place, which makes it difficult to estimate how many people were there.

"The question did come up at one point where Mr. Burak said that he did not think that he could furnish the necessary opinion.

"Q Who was present at that time, if you can remember?

"A I do not remember.

"Q Did Mr. Burak say why he could not furnish the opinion?

"A It was a legal question. I just do not remember. If I heard it it did not make any impression on me.

"Q What happened then? Was there some surprise or consternation or reaction on anybody's part?

"A I would say there was an element of surprise at that time, yes. I believe Mr. Persky --

"Q What happened there?

"A I believe Mr. Persky said he knew something about the law on that and that he could furnish the opinion.

"Q Did Persky say he disagreed with Burak?

"A I do not remember.

"Q Did you authorize Persky to act on behalf of the partnership?

"A I cannot answer that 'yes' or 'no'.

"Q What do you mean?

"A I don't remember.

"Q Did Persky ask you if he could act on behalf of the partnership?

"A I don't remember.

"Q Did any other general partner ask Persky to act on behalf of the partnership?

"A I do not know.

"Q Now, Persky was at that closing representing who?

"A The corporation.

"Q Did you hear any discussion between the other attorneys, that is, other than Burak and Persky, concerning Burak's refusal to sign the opinion letter and Persky signing it?

"A No.

"Q Can you remember anything else about that?

"A No.

"Q Can you remember anything else about that?

"A No.

"Q Can you remember whether there was a discussion as to whether the transaction could be closed without such an opinion letter?

"A No, if such a discussion took place, presumably I wasn't there.

"Q Or you do not remember?

"A Or I do not remember.

"Q And you do not remember anything other than you have told us now about that opinion letter that Burak would not sign and Persky did sign?

"A That is correct.

"Q Was any counsel there representing you other than Burak representing the partnership?

"A No.

"Q You relied entirely on Burak at that closing?

"A I made a telephone contact with Kaplan. I just do not recall. Not during the entire evening, if I was.

"Q Do you recall whether you called Kaplan about this opinion letter?

"A I do not think so."

MR. SHAW: Can we stipulate who Mr. Kaplan is?

MR. MANDEL: We will stipulate that Mr. Kaplan was another attorney who was consulted by this witness from time to time.

MR. SAHW: Daniel Kaplan, of Tanzer, Greenblatt, I believe.

MR. ROTHMAN: May we show for the record that Exhibit P-78 is in evidence as Kayne Exhibit H.

MR. SHAW: 64, line 9:

"Q Prior to the Buckley settlement,did you know and approve of the terms of it?

"A My recollection is yes.

"Q Did you authorize that settlement to be made on behalf of the partnership?

"A Yes.

"Q Were you aware that one" --

THE COURT: Are you aware, Mr. Shaw, that he's amended that answer?

MR. SHAW: No, I am not, not from my copy.

THE COURT: I think he has amended that answer to read 3/27/75. "My present recollection is that I did not specifically authorize it on behalf of the partnership," and then appear the initials "R.H."

MR. GRUTMAN: We don't have it on our copy. We tak it from the Court of course.

MR. SHAW: It is not on our copy.

"Q Were you aware that one of the terms of the proposed settlement involved the purported assignment by Buckley to Newburger Loeb & Company of a claim against Charles Gross and Gross & Company?

"A I was aware of an assignment against Gross & Company, yes.

"Q Were you aware that prior to the Buckley settlement neither Mr..nor Mrs. Buckley had ever filed any litigation or arbitration or made any demands or claims upon Gross or Gross & Company?

"A I do not remember. I do not remember.

"Q You do not remember whether you were aware of that?

"A I am aware of it now. I do not remember whether I was aware of it at that time or not."

MR. SHAW: Line 13:

"Q To the best of your recollection, did you authorize the settlement solely on your own?"

MR. SHAW: Is there a correction to that?

"A To the best of my recollection, if, I don't remember, I do remember discussing it with Berkowitz. He was a lawyer which I am not. It seemed to me to be a fair settlement and from what I understand. Beyond that, I cannot answer the question."

MR. SHAW: Page 69, line 13:

"Q Was it your purpose in authorizing the Buckley settlement to get an assignment for the Buckley claim so that you could recover on behalf of the partnership as much money as possible from Gross & Company?

"A I can only state that the terms of the settlement as I understood them at that time were intentions to get as much money as possible into the partnership at a time we needed it. I cannot speak beyond that."

MR. MANDEL: You are stopping there?

MR. SHAW: No. 69.

MR. MANDEL: You are going on? Are you skipping or what?

MR. SHAW: I'm sorry.

MR. MANDEL: Mr. Shaw, I am trying to find out--

MR. SHAW: Just a minute. I am sorry, I missed something. Page 69, line 8:

"Q Was it your purpose in authorizing the Buckley settlement to acquire a bargaining wedge against Charles Gross?

"A No."

MR. SHAW: Page 80, 79, line 15:

"Q Are you aware that certain affidavits had been made on behalf of plaintiff and the additional defendants on counterclaims in this action to the effect that Mr. Gross was guilty of wrongdoing by engaging in secret and unauthorized trading on behalf of Newburger Loeb & Company?

"A I have glanced over that affidavit, yes.

"Q Now, whose affidavit was that?

"A I think Ned Frank's.

"Q Now, was there a time when Mr. Gross engaged in trading on behalf of the Newburger, Loeb partnership and without your knowledge?

"A Yes.

"Q When was that time, when was that trading conducted?

"A Well, I heard about it later. I believe some time in 1970.

"Q In what month?

"A I do not remember.

"Q And when did you learn of it?

"A At some point from Ned Frank.

"Q And in what security or securities did that trading take place?

"A I believe City Service, City Investment.

"Q And for how many months approximately did that trading take place before you knew of it?

"A I don't remember.

"Q Were those trades paid for with partnership funds?

"A Yes.

"Q Were the trades made in the partnership name?

"A I believe so. I am qualifying my answer because I am basing it largely upon Ned Frank's affidavit from what he said. I have no more specific recollection than that.

"Q Do you remember learning of these trades?

"A From Ned Frank.

"Q In 1970 some time?

"A Yes."

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MR. MANDEL: Are you stopping there?

MR. SHAW: Yes.

86, line 3:

"Q Now, let us see if we can get an answer to this.

"Do you recall that Frank made a charge of what he thought was serious wrongdoing committed by Gross, the general partner, is that correct?

"A Yes.

"Q Did you feel that as another general partner and a member of the executive committee you had an obligation to do something concerning any wrongdoing that Gross might have committed?

"A Mr. Mandel, we were struggling with a lot of problems, most of them, particularly if it took place as late as I recall it having taken place, we were struggling with a great deal of problems. I was concerned about personal bankruptcy, the solvency of the firm; we were under a great deal of pressure with a lot of meetings, with a lot of people.

"I cannot answer what I should or should not have done in view of the crisis conditions that prevailed.

"Q Did you tell Frank to tell any of your other partners about his accusations?

"A No, to the best of my recollection, no.

MR. MANDEL: Are you stopping now on line 24?

MR. SHAW: Yes.

89, line 11:

"Q Did there ever come a time when you discussed with any of your partners or attorneys for the partnership the question of bringing acount against Gross for his alleged wrongdoing in connection with secret trading?

"A I can only answer that Mr. Mandel by saying Ned Frank said he intended to do something about it. Does that constitute a discussion?"

MR. MANDEL: Are you stopping there?

MR. SHAW: Yes.

MR. GRUTMAN: 111.

MR. SHAW: 110, line 5:

"Q Now, I am not going to go through in detail the schedule of discrepancies reported by the Stock Exchange in Exhibits A and B. Mr. Abrams said 81 and 82.

To Defendant's Exhibit 82 for identification but I assume that you have looked at them, have you not?

"A I have.

"Q Having reviewed Exhibits 80, 81 and 82 ,I ask you now whether in your opinion Charles Gross was personally responsible in all candor, for the Stock Exchange censure given to Newburger, Loeb & Company on July 24, 1970?

"A Your question" --

MR. MANDEL: Excuse me, one minute. I am going to object to this, your Honor, on the ground that it is incompetent, it calls for a conclusion.

MR. SHAW: I think you will see that subsequently he gives reasons, your Honor, and it is not just --

THE COURT: Where is the reason?

MR. GRUTMAN: 111. Specifically, line 24.

THE COURT: He has made a change, you know, in 111.

MR. GRUTMAN: We have not seen it.

MR. SHAW: Not in my copy.

THE COURT: I see. All right. The change is on line 14. The word "primary responsibility" is changed to "primarily responsible."

MR. GRUTMAN: The rest is intact?

THE COURT: Let me ask you this:

MR. SHAW: Line 24, page 111.

THE COURT: Mr. Mandel has an objection here.

I do not see what this adds. This man is giving a sort of a broad brush opinion on a question of legal responsibility because he is the managing partner, and running the firm, but he specifically says, if I can go ahead a little bit, he specifically says, as I see it, that Gross

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was not responsible for discrepancies, did not formulate the questionnaires; what do you get out of the answer that you would have me consider as a factual matter as the trier of the fact?

MR. SHAW: I see it in context with various other aspects of the testimony in this case, your Honor; specifically, Mr. Therese's testimony that shortly after Mr. Gross became a partner of Newburger, Loeb in January of 1969 he realized that there was some trouble or Mr. Therese used a more colorful word. He realized that something had been done to him.

Now, thereafter he becomes the managing partner and signs a special operating questionnaire in which he says there is only one difference. The difference relates specifically to the type of trouble that existed, in other words, the back office mess.

THE COURT: I know, but Therese was given primary responsibilty in and an absolutely free hand and complete backing to clear it up and Charles Gross, according to Therese, knew nothing about back office problems at all.

MR. SHAW: I do not think Mr. Therese goes that far, your Honor. I think Mr. Therese indicates that Mr. Gross had no or little familiarity with operational questions having been with a clearing firm for so many years. But Mr.

Therese's testimony raises an issue as to whether Mr. Gross shortly after he became a partner of Newburger, Loeb in January of 1970 realized he had been "screwed." I am using his precise word.

And if he realized he had been screwed, I think there is an inference that he knew then of the back office mess, because that was the problem with Newburger, Loeb at that time.

THE COURT: That does not help us with the competence of an answer from Mr. Stern here. I don't see it.

MR. SHAW: Mr. Stern is the one who signed the questionnaire along with Mr. Gross.

THE COURT: He does not say that Mr. Gross had a personal awareness of any error in those questionnaires.

MR. SHAW: No, he does not say that, your Honor.

THE COURT: So I am going to sustain the objection.

MR. SHAW: I am just wondering if I could get it in with the weight being left. I would like to complete the record on this.

THE COURT: You can deem, what is it, 111 through 15?

MR. SHAW: 110, line 5.

THE COURT: To where?

MR. SHAW: Through 112, line 2.

THE COURT: I will let you deem those pages marked for identification. Go on.

MR. MANDEL: May I interrupt for a moment, just in connection with that, this might be a good place for me to put in an answer to an interrogatory made by Mr. Stern.

MR. SHAW: No.

THE COURT: I think this is a bad place, Mr. Mandel. All right? You will reserve the right until you have the floor.

MR. SHAW: Your Honor, could you just hold up your ruling until you have seen 118? I think 118 ties in with 111. I offer 118, line 9 through 119, line 5. And I call the Court's attention to the fact that the SOQ, the special operating questionnaire, is dated in the middle of 1969.

MR. GRUTMAN: It indicates a personal awareness on Gross' part.

MR. MANDEL: Again, your Honor, I object to that. It does not rise to the question of competent proof.

THE COURT: No, I do not see it. I see the statement Mr. Shaw refers to. I would say Mr. Gross was aware of what was going on in the back office, but that is not competent proof that he falsified any answers on the

SOQ's, which is the ultimate fact.

MR. SHAW: I think that the issue is --

THE COURT: Mr. Shaw, let us put it this way:

I see this, this is probably admissible, its weight is so slight, if you want it in I will leave it in, but I find its weight to be so slight as to be virtually unworthy of consideration.

MR. SHAW: I think that-- let us just get it in to complete the record.

THE COURT: If you are asking me to find that Mr. Gross knowingly filed false SOQs with the Stock Exchange on the basis of the answers on the bottom of page 118, I would not do it.

MR. SHAW: I do not ask you to do that, your Honor. I merely ask you to take this in conjunction with many other elements in the case, in final argument on the issue of whether he knew or should have known.

THE COURT: I will permit it.

MR. SHAW: Thank you, your Honor.

118, line 9:

"Q I ask you to look at the rest of Exhibit A to page 82"-- (I think that is Exhibit 82) -- "and ask whether any of the discrepancies involved in the entire page, were a responsibility of Gross in whole or in part?

"A Are we talking about the number of differences or in the report here, the recording of the number of differences to the Stock Exchange?

"Q All right. I am talking first about the existence of the discrepancies in the records.

"A Well, I would say certainly through the end of 1968 and the answer would have to be no, because he certainly did not, he was not a partner and he was not responsible for the preparation of any of these questionnaires during that period of time.

"For 1969, there was indeed, any question of reporting of differences, I would say that Mr. Gross was aware of what was going on in the back office at that time.

"Q Was anybody besides Mr. Gross aware of what was going on in the back office at that time?

"A There were certain employees involved in the back office operation."

MR. SHAW: Your Honor, I would like to reoffer 110 through 112 in conjunction with Mr. Therese's testimony, and this testimony by Mr. Stern, for the proof of the fact that during this period Mr. Gross "guided the type of answers that we would give and had some degree of responsibility."

THE COURT: I decline to accept that.

MR. SHAW: Your Honor, an accountant witness has just entered the courtroom about five minutes or so ago. I wonder if we could have a brief recess and then call the accountant to the stand. It is 11 o'clock, I note.

THE COURT: Very good.

MR. SHAW: Thanks very much.

(Recess.)

MR. SHAW: Mr. Alvey.

ESTILL ALVEY, called as a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Alvey, how are you employed presently?

A I am currently with Peat, Marwick, Mitchell. I am an audit manager.

Q How long have you been so employed?

A With Peat, Marwick, approximately nine and a half years.

Q Would you give us a brief resume of your educational and professional background?

MR. MANDEL: I will concede his qualifications as an expert, if your Honor please.

THE COURT: All right.

Q Are you a certified public accountant?

A Yes, I am.

Q And are you familiar with Newburger, Loeb & Company?

A Yes, I am.

Q When did you first become familiar with that company?

A My first assignment to Newburger was in November of 1969.

Q And during what period of time did you perform work for Newburger, Loeb?

A From that time to just -- the partnership or the corporation?

Q The partnership.

A To 1970. The last thing, specifically for the partnership, was December 31, 1970, I believe.

Q And are you familiar with the Peat, Marwick, Mitchell & Company statement of financial condition of Newburger, Loeb & Company for the period ending December 31, 1970?

A Yes.

Q Did you perform work on that report?

A I was, I supervisied the senior accountant that was on the engagement, reported to the partner.

Q In connection with the preparation of a financial report, and specifically the Newburger, Loeb & Company financial report, is it the procedure of Peat, Marwick & Company to prepare work papers?

A Yes, it is.

Q And what is the procedure with respect to the retention of the work papers?

A We retained the work papers for a period of -- I believe it is either three or six years, whichever. At that time they are then microfilmed and a permanent record is maintained of the microfilm.

Q Is it a microfilm record?

A Yes, currently.

Q And do you know what became of the work papers that were prepared in relation to the preparation of the December 31, 1970 financial statement?

A The work papers have been destroyed.

Q And do they exist solely in the form of microfilm?

A Yes.

Q And how bulky are the work papers; how bulky were the work papers before they were destroyed?

A I believe they were something like six, what we call work paper binders, approximately.

Q Each binder --

A Each binder may be an inch thick or so.

Q Recently, at the request of Mr. Risher, have you had occasion to examine the microfilm records -- strike records -- work papers in binder 12WPZ8C8G?

A Yes.

Q What is the procedure in order to enable you to view these work papers? Do you look at them through a machine of some sort?

A Yes, we place the microfilm on a machine and view it through a viewer.

If I could correct an earlier statement.

You requested how many binders that we had for the engagement. The indication of work binder 12 indicates that there at least twelve binders for the engagement. I think I said approximately six.

Q And each one was about an inch thick?

A Yes, I would think so.

Q Now, in your examination of the work papers through the viewing machine that you conducted at Mr. Risher's request last week, you inspected that particular binder and work paper that I have just referred to.

Did you observe whether the work papers indicated that certain expenses should not be applied to the period prior to September 30, 1970?

A No.

Q What did you observe?

A Work papers Z8G represents two pages of an internal document of Newburger, Loeb & Company which was part of their internal financial statements. One page related to certain items which were labeled "Extraordinary Items." I forget exactly what both pages were.

There were just two pages of the income and expense accounts.

Q And there was nothing in the document to indicate that the expenses should not be applied to the period prior to September 30, 1970?

MR. MANDEL: I object to that as leading.

THE COURT: Yes, sustained.

MR. SHAW: That is just a repetition anyhow.

THE COURT: Well, the documents would speak for themselves in any event. I take it we have a copy.

MR. SHAW: It is a microfilm document, your Honor.

THE COURT: You can obviously make copies. You have two sheets of paper, you are talking about two sheets of paper from a microfilm.

MR. SHAW: We will furnish that document before the trial is over.

MR. MANDEL: We need in connection with the examination.

THE COURT: What about in connection with this gentleman?

Q Mr. Alvey, when you want to make copies of some things, do you have some photocopying system?

A We can copy it and I apologize. I just inadvertently did not bring it with me.

MR. SHAW: Just one moment, your Honor.

Would you mark this an exhibit for identification.

(Plaintiff's Exhibit 127 was marked for identification.)

Q I place before you PLaintiff's Exhibit 127 for identification and ask you to look at it.

Do you recognize the document?

A Well, when you say do I recognize the document, I have seen something which appears to be something similar to this, yes.

Q What is the document before you?

A It is labeled Newburger, Loeb & Company Statement of Income. It is headed up November, 1970 and December 1970, year to date, December 31, 1970.

Q Is that a document which is received or was received by Peat, Marwick, Mitchell from Newburger, Loeb in connection with the 1970 financial statement?

A It appears to be, yes.

Q And is that a document which was used by Peat, Marwich, Mitchell after being --

THE COURT: Wait a minute now.

MR. SHAW: This is merely a document sent from Newburger, Loeb to Peat, Marwick.

THE COURT: He hasn't even said it is that yet, Mr. Shaw. He says it appears to be. I would like to know whether he knows.

MR. SHAW: Let us clarify.

Q Is there any question that that is a copy of a document sent by Newburger, Loeb to Peat, Marwick?

THE COURT: No, no.

Mr. Alvey, as you sit here on the stand, do you recognize that as a document sent by Newburger, Loeb to Peat, Marwick?

THE WITNESS: Well, it appears to be, your Honor, but you know until I compared it to what is on the film, I really don't think I could say that it is.

THE COURT: Mr. Shaw, you are not quite ready with this witness yet.

MR. SHAW: Let's see what we can do.

Q Is the procedure that is utilized in connection with the preparation of the financial statement one whereby the company sends certain information to the accounting firm?

A Yes.

Q And what information is sent by the company, in general, to the accounting firm?

A Well, they will make available to us their books and records which encompasses general ledgers, subsidiary records, they will normally furnish us with their own internal financial statements.

Q And if they have a monthly profit and loss statements or a compilation of monthly profit and loss statements, they will furnish that to the accounting firm, correct?

A If we so request, yes.

Q In this case, the case of the preparation of the year end 1970 financial statement, did Peat, Marwich actually examine the underlying records, for example, the general ledger of Newburger, Loeb & Company?

A Yes.

Q And did it conduct an examination of other books and records of the company in addition to the general ledger?

A Yes.

Q And it also examined certain internal financial statements prepared by the company?

A Yes, we reviewed them.

Q When you indicated before that you looked at certain documents on this viewer, did the documents that you examined include the internal financial reports prepared by Newburger, Loeb?

A The specific work papers, Z8G includes one, at least two pages of a portion of the internal financial statements.

Q For what period?

A One page I believe was October, November. The other page was November, December, if I remember correctly.

Q In other words, the same period of time covered or encompassed by the document before you?

A Yes.

MR. SHAW: Your Honor, I would like to advise the Court that the document was supposed to be delivered here today but it was forgotten and will be sent by messenger and I believe that we will have it prior to the tim e we reconvene after lunch.

I would like to go on into another area if I may.

Q Mr. Alvey, I place before you Plaintiff's

Exhibit I in evidence -- Finley, Kumble I, I'm sorry -- are you familiar with that document?

A Yes.

Q And did you perform work which resulted in the preparation of that document?

A I participated in the examination, yes.

Q Now, I direct your attention to Schedule I, Line 5, and the column captioned "Partners Net Equity After Distributions."

Do you see the figure, $129, 561?

A Yes.

Q Was that figure computed in accordance with ordinary and customary accounting standards?

A It was prepared in accordance with the management's interpretation of the partnership agreement.

Q And anything else?

THE COURT: What figure are we talking about here?

MR. GRUTMAN: 129,561.

THE COURT: Computed in accordance with the management's interpretation of the partnership agreement.

Q And was it computed in accordance with ordinary and customary accounting procedures?

MR. MANDEL: I object to that. The witness has answered that question.

THE COURT: Yes, sustained.

Q Will you tell us the procedure that was followed in computing the figures set forth on Schedule I?

A Could I have the question again, please?

(Question read.)

A We conducted an examination of Newburger, Loeb & Company, the partnership, as of December 31, 1970, which is represented by the statement of financial condition which we reported on, the statement of financial condition dated December 31, 1970, which we reported on. In connection with that examination, we prepared -- I'm sorry, we reported also on Schedule I, which includes various allocations made to the general partners' capital accounts.

I am a little lost as to what your question is really getting to.

Q All right, let me do it this way:

Referring to the statement of financial condition which is the second page of the document before you, was that page computed in accordance with customary and standard accounting procedures?

A Yes.

Q And does that page compute as an item capital of Newburger, Loeb & Company?

A Yes.

Q And what figure was computed as the capital of Newburger, Loeb & Company as of December 31, 1970?

A 1,652,615.

Q Was that figure computed in accordance with customery and standard accounting practices?

A Yes.

Q Will you tell the Court the relationship between that figure and Schedule I?

A Schedule I is a schedule detailing the individual balances of the general and limited partners, the total of which agrees to the line item capital on the statement of financial condition.

Q In making the computation, did you have access to, and by computation, I am referring to the computation set forth in Schedule I, the partnership agreement?

A Yes.

Q And was the computation set forth in Schedule I computed in accordance with standard and customary accounting procedures and the partnership agreement?

MR. MANDEL: I object to that.

THE COURT: Yes, sustained.

MR. SHAW: All right, withdrawn.

Q Would you tell us how the figures set forth in the column to the right of Schedule I were computed?

A Let me take each caption that is on this schedule and see if I can explain them.

Q All right.

A The first column, "Debit/Credit Net Ledger Balances In Accounts" were the balances that existed prior to the distribution of the various columns to the right of that.

The "Market Value of Securities" column represents the market value of securities in the capital accounts of the respective partners.

The column "Partners Net Equity Deficit" is a combination of columns one and two.

Q May I interrupt for a second?

A Yes.

Q Does the figure, Partners Net Equity, and Debit/Credit Net Ledger Balances In Accounts represent a figure setting forth the capital of each partner as of December 31, 1969, the preceding year?

A No.

Q What figure does it represent?

A It represents what was on the books and records of Newburger, Loeb prior to the distribution of the four columns to the right of it.

Q What books and records?

A I think that it was included in what was termed the private ledger which was a subsidiary ledger of the general ledger.

Q Captioned "Capital Accounts"?

A Yes.

In addition to it, it would have included any securities accounts that would have been carried not in the private ledger, but in a detail customers accounts ledgers which also included partners' accounts, I believe.

Q Now you used a word "distribution." You said prior to a distribution. What do you mean by that?

A Well, the books and records had not reflected a distribution of profits and losses that had accumulated in undistributed P&L accounts.

Q Does that also mean an adjustment to the capital account?

A It means a reflection in the capital account of the respective share of the profits and losses.

Q Now, would you continue?

A The next column, 1968-1969 Back Office Losses, was distributed pursuant to agreement among the partners.

Q Did you see that agreement?

A Yes.

Q Tell us what that in substance did.

A It was an agreement among the partners of how losses which were entitled Back Office Losses, were to be distributed among those partners.

Q What do you mean by that?

A There was an agreement among the partners as to how the back office losses were to be charged to their capital account.

Q Other than as set forth in the partnership agreement?

A Yes.

Q In other words, the partnership agreement contains an agreement as to how profits as well as losses are to be distributed, correct?

A Yes.

Q But this was a modification to that agreement?

A Yes.

Q And pursuant to this modification there was a different type of distribution, correct?

A Yes.

Q In other words, the partners made a different type of adjustment between themselves?

A Yes.

Q The effect of that was that certain partners bore more of the brunt of the loss than others, correct?

A Yes.

MR. MANDEL: Excuse me; we have not challenged the distribution of back office losses. In fact, our accountant said he thought it was right. I do not think we should waste time at this juncture with it.

Q Would you go to the next column and explain that?

A Unrealized losses on exchange memberships was distributed according to the partnership agreement.

Q How was that loss sustained?

A The loss on the membership?

Q Yes.

A The market value of the exchange membership was below the cost as reflected on the books and records of Newburger, Loeb & Company.

Q Why was that an unrealized loss?

A Because --

MR. MANDEL: Your Honor, this column is not in issue either.

THE COURT: Yes, Mr. Shaw. Do we have to get into these?

MR. SHAW: I am merely trying to indicate, your Honor, how the distribution was made, and I think that it is relevant to see that these concepts are applied whereby certain losses can be adjusted between partners, certain unrealized losses can be distributed, because I think that it establishes that apart from the partnership agreement there is a realization between the partners that there will be give and take between themselves, that adjustments will be made, which happened subsequently.

Although Mr. Gross' position is that it should not be done.

MR. MANDEL: The evidence your Honor, is certainly not admissible for that reason to interpret the partnership agreement.

THE COURT: You mean because there were adjustments while he was there and consented to them, that he is therefore aware of a practice that there will be adjustments and therefore there can be adjustments as to him afterwards when he does not consent?

That is what you are saying to me, that he is on notice that there can be adjustments even though he may not consent to them?

MR. SHAW: I think it is relevant, your Honor.

THE COURT: Is that what you are saying? That is what you are arguing from that point?

MR. SHAW: Yes.

THE COURT: I do not follow that. If he can make a deal with his partners to allocate back office loss that does not mean that he is giving them carte blanc to make adjustments to which he does not consent that are not otherwise provided for.

MR. SHAW: Having gotten the benefit of an adjustment for back office losses, it seems to me Mr. Gross should not subsequently take the position that his capital account is inflexible.

THE COURT: Well, Mr. Shaw, your position is challenged.

MR. SHAW: All right.

THE COURT: I cannot say that I see an awful lot of merit to it.

Q Would you describe the next column?

A 1970 Operating Losses. The distribution was made in accordance with management's interpretation of the partnership agreement.

THE COURT: To shortcut this, are we getting down to the bottom line which is that these items that are in dispute here were allocated back against Gross without his consent?

MR. GRUTMAN: No.

THE COURT: That is what I am trying -- well, Mr. Grutman, I am trying to see where we are going with this.

MR. SHAW: How it was allocated is relevant. I would like to ask the witness how it was allocated.

THE COURT: Why don't you do that then and let us get to that.

Q How was the allocation made, set forth in the column captioned "1970 Operating Losses"?

A Pursuant to the interpretation of the partnership agreement, there is a formula that is in one of the sections of the partnership agreement.

Q And was that allocation made uniformly among all partners?

A Yes, sir.

Q And was it made with respect to all general partners and limited partners regardless of who they were?

A Yes.

Q And were there any instructions received to treat Mr. Gross in any way different than any other person?

MR. MANDEL: I object.

THE COURT: Yes, sustained.

MR. SHAW: All right.

THE COURT: He said this allocation was done in accordance with management's interpretation of the partnership agreement. That is where we were some minutes ago.

Right?

THE WITNESS: Yes.

THE COURT: What was their interpretation of the partnership agreement? Let us go to that.

Q What was their interpretation? Was that interpretation conveyed to you?

A It was the application of the formula which is contained in the partnership agreement.

Q And can you recall in substance the nature of that formula?

A I believe it was gross revenues as a -- over gross profits and losses times the net loss for the year.

Q Anything else?

A I cannot think of anything.

THE COURT: Hold that.

Read that, please.

(Record read.)

Q Was that formula applied in computing the distribution of the losses among the various partners?

A Yes.

THE COURT: That is what he said.

Q And through the application of that formula -- withdrawn.

Would you explain the next column captioned "Partner Equity (Deficit) After Distributions"?

A That column represents the total effect of the prior columns. It is just a total.

Q Calculated mathematically?

A Mathematically, yes.

Q Was it relevant in making the computation set forth in the last column whether the loss was an ordinary or an extraordinary loss?

A Was it relevant?

Q Yes.

A No.

MR. MANDEL: I object to that as calling for a conclusion.

MR. SHAW: He is an expert witness, your Honor. We are entitled to receive his conclusion.

MR. MANDEL: It is a question of the interpretation of the agreement. I suppose what that question means, if anything, is --

THE COURT: Is, that he did not pay any attention to whether it was ordinary or extraordinary, that is what that answer means.

MR. MANDEL: Yes.

THE COURT: Go ahead.

Am I right, Mr. Alvey?

THE WITNESS: Yes.

Q And was that in accordance with generally accepted accounting principles?

MR. MANDEL: I object to that because that has nothing to do with generally accepted accounting principles. It has to do only with the management's interpretation.

THE COURT: Does the application of the management's formula have anything to do with generally accepted accounting principles?

THE WITNESS: The components of it may have, but the formula itself does not relate to generally accepted accounting principles.

THE COURT: Very good.

Q Just getting back to the question as to whether the loss was an extraordinary or ordinary one, and your testimony is that you disregarded that in making the computation, in so doing, were you acting or was that in accordance with ordinary and accepted accounting principles?

MR. MANDEL: I object to that. It has no meaning in this context.

THE COURT: I feel that it did, given the witness' last answer.

THE WITNESS: Can I have the question again , please?

MR. MANDEL: My objection is, is Mr. Alvey now talking about the allocation of losses amongst partners or the determination of the loss for the firm?

THE COURT: I assume he is talking about the allocation among partners. He paid no attention to whether it was an extraordinary or an ordinary loss.

Q Is that correct?

A In determination of the net loss for the year, which was used in the formula for the allocation, we did not make a difference between ordinary as adverse to extraordinary.

Q Just one question:

In so doing, were you acting in accordance with customary accounting procedures?

A In reporting upon net loss, yes.

THE COURT: No, no, not distinguishing between ordinary and extraordinary.

Q In determining the loss for a year.

A For the firm, yes.

Q Let me ask you this question:

Directing your attention to Schedule I, line 5, I ask you this:

Was the figure set forth in Schedule I, line 5 , of $192,561 computed in accordance with customary and standard accounting practices?

MR. MANDEL: He has already answered that.

MR. SHAW: Will you stipulate that his answer will be yes?

THE COURT: Is this the Gross figure we are talking about? The Charles Gross figure?

MR. MANDEL: Yes.

THE COURT: He has already testified as to how he got there.

Q Well, was that computation made in accordance with customary and standard accounting procedures?

THE COURT: Mr. Shaw, he said he got there by applying a management formula from the partnership agreement.

MR. SHAW: The management formula which is contained in the partnership agreement.

MR. GRUTMAN: The question, I think, your Honor, is --

THE COURT: And he said that accounting procedures do not have anything to do with management formulas.

MR. GRUTMAN: Except I think the question Mr. Shaw is struggling to propound is whether or not it was in accordance with generally accepted accounting principles to have applied the management formula in the computation of the partnership --

THE COURT: What has accounting principles got to do with the management formula? Mr. Alvey said earlier he didn't.

MR. GRUTMAN: The suggestion that Mr. Mandel is trying to get across to the Court is that somehow or other the management propounds a formula for its own benefit which is rubber stamped by the accountants. Now, that is not necessarily so, if it is not in accordance with generally accepted accounting practices they question it. They do not swallow what management tells them unless it squares with the agreement, and that is what Mr. Shaw is trying to get at, and Mr. Mandel is trying to obfuscate --

MR. SHAW: Let us do it this way, your Honor:

Q The formula that you have referred to, did you compare the formula to the agreement?

A Yes.

Q And did you see that the formula was in accordance with the agreement?

A Yes.

THE COURT: So it has nothing to do with accounting principles which is what I have been saying for ten minutes here. All right? Let us go on. We have been an hour since we recessed to have this witness. Let us get going with this gentleman, please.

MR. SHAW: I still have to get that one question, your Honor, and I think that I am entitled to it.

THE COURT: Which is this?

MR. SHAW: Whether or not the figure was computed in accordance with --

THE COURT: No, he said no two times. He said how it happened. I sustained an objection. Let us go on to the next subject.

Mr. Alvey, am I being unduly rushing with this? I mean, accountants have principles for certain purposes, but one of them is not to say how a formula is computed. If it is there, you use it.

THE WITNESS: It is the agreement.

THE COURT: If the agreement is there you use it. All right, go ahead.

MR. SHAW: Nothing further.

MR. GRUTMAN: Please mark these.

THE COURT: Mr. Grutman, without wanting to prejudice your examination, may I ask what basis you have to examine this gentleman at all?

MR. GRUTMAN: You are right, Judge. Only I think that I wanted to ask a few questions as an aid to the Court. I realize that his testimony does not bear on any issue in which I am directly involved. But there were some questions that Mr. Shaw was trying to ask concerning how the numbers on Schedule I were arrived at and what the accounting firm did in order to arrive at that. I have certain documents which I think would be illuminating to demonstrate that the accounting firm was not just a rubber stamp, that they asked questions, they made an investigation and that that is their report, their interpretation of the proper figure.

MR. SHAW: This figure affects everybody in this case, because this is the ultimate damage if it --

THE COURT: Mr. Grutman is, in effect, picking up your examination at this point because he has acknowledged it is not his own and in the interest of saving time here, I am just trying to see why other people are getting in on this situation.

MR. GRUTMAN: Maybe because it is because I understood what your Honor was trying to get at and I can do it in three minutes.

THE COURT: Go ahead.

EXAMINATION BY:
MR. GRUTMAN:

Q Mr. Alvey, I show you documents that have been marked Finley Kuble Exhibits II and JJ for identification.

Have you seen them before?

MR. MANDEL: May I approach and look at these? We may save a few minutes.

No objection to them. Let's put them in and move on.

MR. GRUTMAN: Offer them in evidence.

THE COURT: Received.

(Finley, Kumble Exhibits II and JJ were received in evidence.)

Q Do these two documents reflect the correspondence that was exchanged between Peat, Marwich and Newburger, Loeb & Company concerning questions that the accounting firm had of Newburger, Loeb and the answers that Newburger, Loeb gave to the accounting firm that aid you in the preparation of the financial statement as of December 31, 1970?

MR. MANDEL: I object to that leading question. Ask him who drafted the second document.

THE COURT: Yes, I sustain that objection.

MR. MANDEL: Ask him who drafted each document.

THE COURT: Do you have any personal familiarity with either of those letters?

THE WITNESS: Yes, I have seen them before.

THE COURT: Did you draft one?

THE WITNESS: I would have helped drafting this.

MR. GRUTMAN: II.

THE COURT: And you received an answer to that, did you?

THE WITNESS: Yes.

Q And the answer you got is JJ and that comes from Newburger, Loeb?

A Yes.

MR. MANDEL: Don't lead him. Ask him who really drafted it.

THE COURT: Well, if he knows.

A It is signed by -- I think it looks like Robert Newburger and I do not know the first -- maybe Andy Newburger.

MR. MANDEL: Ask him if he knows who drafted it.

THE COURT: You may ask that on cross examination.

Q The documents, sir, together were used by the accounting firm; you then prepared the numbers, is that correct?

A When you say "you prepared the numbers" --

Q Peat, Marwick then prepared its financial statement?

A Well, we -- the financial statements are prepared by the client and we report on the preparation, report upon the number.

Q You reviewed the financial statements?

A We report on the financial statements prepared by the client, yes.

Q If the client supplies you with information with which you disagree, do you tell that to the client?

A Yes.

Q And I take it that what the client tells you just does not automatically get into your statement, correct?

A Correct.

MR. GRUTMAN: No further questions.

THE COURT: All right. Anybody else on the front table?

Mr. Mandel.

MR. GRUTMAN: The Court owes me one minute, Judge.

THE COURT: No, Mr. Mandel spared you one minute on the identification of the exhibits.

MR. GRUTMAN: Fine.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Alvey, the major responsibility for this particular audit was Mr. McManus', right?

A He was the partner in charge, yes.

Q Who actually had the contact with the client in the preparation of this financial report, was it you or

Mr. McManus?

A Both of us.

Q All right.

A There was three people, at least three people involved, the senior in charge, myself, and Mr. McManus.

Q Most of the actual contact with the client was McManus, right?

A Actually, from whose standpoint, number of hours or --

Q Conversations with the client.

Let me put it to you this way:

II is written to Mr. Risher, is it not, and it is marked "Private."

A Yes.

Q Mr. Risher was not a partner, right?

A Correct.

Q Now, McManus sent it to Risher, McManus signed it, not you.

A Yes.

Q Do you know why McManus sent it to Risher?

MR. GRUTMAN: Objection, sir.

THE COURT: No, overruled.

A Specifically why I sent it to Risher, I really don't know. I cannot recall.

Q It was marked "Private" as well; you know that, you noticed that on the letter?

A Yes, it is on the letter.

Q Do you know why it was marked "Private" when it was sent to Risher?

A No.

Q You have stated that JJ contained Robert Newburger's signature. Do you know that in fact; do you know in fact who drafted JJ?

A No.

MR. SHAW: Objection, your Honor, that implies that the person --

THE COURT: No, overruled.

Q You don't know?

A No.

Q Did you look amongst the microfilm papers to see if Risher drafted a reply or if McManus drafted this reply that is on JJ?

A Did I look?

Q Yes.

A At the microfilm to see? No.

Q As you sit here today, you don't know?

A Correct.

Q Now, you have testified that it was necessary in some way to interpret the partnership agreement in order to determine the distribution of losses during the year to Mr. Gross, is that correct?

MR. SHAW: Objection, your Honor. That is an unfair paraphrase of his testimony.

THE COURT: No, he said in accordance with management's interpreation of the partnership agreement. Those are his exact words and so he says there is an interpretation. He used the word "interpretation" in his answer.

Go ahead.

Q Now, when you said management's interpretation, did you mean Mr. Risher's interpreation?

A Not specifically, no.

Q Specifically whose interpretation did you mean? If you know, who was it that gave you the interpretation of the partnership agreement? In other words --

A I don't know.

Q You don't know the answer to that?

A No.

Q But this we are clear about, are we not, that the management whose interpreation of the agreement you followed told you that Gross was to be charged with losses whether they were ordinary or extraordinary, right?

A Whose definition of ordinary and extraordinary? I don't know that the definitition was ever given in that manner.

Q Well, the work papers do show something about extraordinary losses, do they not? Some of the work papers are so labeled "Extraordinary."

THE COURT: Are you aware of that?

Q Are you aware of that?

A Well, the document, the internal documents of Newburger, Loeb are labeled "Extraordinary", yes.

Q All right. And management told you that Gross was to be charged with all of those losses whether they were ordinary or extraordinary, right?

A The distribution included both types of those items, yes.

Q Without distinction between them?

A Yes.

Q And that was in accordance with management's interpretation of the agreement, right?

A Yes.

Q Yes?

A Yes.

Q And management told you that Gross was to be charged with all of such losses whether incurred before or after the effective date of withdrawal, correct?

A Could I have the question again, please?

(Question read.)

A The formula included losses subsequent to September of 1970.

Q Including extraordinary losses, right?

A Whose definition of extraordinary?

I don't want to say that I am calling it extraordinary.

Q All right.

MR. SHAW: Wait a minute, the witness is trying to say something.

Q I am talking about the definition of extraordinary which appeared on management's papers.

A On management's papers the extraordinary items were included. Or what was labeled extraordinary by management on the financial statements.

Q Finally, there were certain write-downs taken after the close of the calendar year, is that correct, that were taken in[illegible] account in computing losses for the year?

A After the calendar year?

Q The write-down occurring after the end of the calendar year.

A The write-down, you mean as reflected in the financial statements?

Q Yes.

A The adjustments that were reflected in the financial statements, the adjustments may have been determined after 12/31/70, but they were determined to be for the period on or before December 31, 1970.

Q And those write-downs were determined by management, is that right?

MR. SHAW: Objection.

THE COURT: Overruled.

A The financial statements were prepared by Newburger Loeb's personnel and we reported on them.

Q And further it is true, is it not , that in distributing losses to Gross he was charged with certain leasehold payments which were not made at all during the calendar year 1970, is that correct?

A Specifically as to what?

Q The Atlas payments? Do you know what I am talking about?

A The settlement relating to the Atlas?

Q Right.

A The actual --

Q Let me put it to you this way --

MR. SHAW: Let him finish.

A The actual payments may not have been made until subsequent to 1970. I think that there was an initial payment made in 1970 with the remainder of the balance of the settlement to be paid later.

Q In subsequent years?

A Subsequent to December, 1970.

Q Running 18 months or so, right?

A I don't remember.

Q And Gross was charged with the payments that were made in 1970 and also with the payments that were made in '71 and '72?

A That was part of the number which was determined to be the net loss, yes.

Q In accordance with management's definition, right?

A Well, which we also consider in accordance with generally accepted accounting principles.

Q Now, accounting statements and computations and determinations are made for specific purposes, isn't that correct?

A Yes.

Q And depending on the purpose, sometimes things are handled a little differently, right? That is a cardinal accounting principle, right?

A Depending on the situation, yes.

Q All right.

Now, the determination of the loss of the partnership as a whole, as reflected in an accounting statement, can be quite a different matter from the determination of a particular withdrawn partner's share of the loss pursuant to the agreement, is that right?

A Yes.

Q And Peat, Marwick did not purport to determine whether under the agreement Gross should be charged with rent settlements actually paid in '71 and '72, am I right about that?

A Can I have the question again, please?

(Question read.)

A Correct.

Q Now, I ask you one thing further, Mr. Alvey:

You note on Schedule I that $75,000 is shown as the capital of Jeanne Donoghue and of Mabel Bleich; do you see that?

A 75,000 each.

Q Right.

A Correct.

Q Now, those determinations were also made in accordance with management's interpretation of the partnership agreement, right?

A Yes.

MR. MANDEL: Nothing further.

REDIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Alvey, if management reported certain figures to you, and you disagreed with them, would you have included management's figures in your report?

MR. MANDEL: Objection.

THE COURT: I think it has been asked and answered.

MR. GRUTMAN: I don't believe so.

MR. MANDEL: And this was not the subject of my cross examination. My corss examination was really limited to interpretations.

THE COURT: I am going to sustain it. It has been asked and answered. He has already said he would not.

Q Well, if the interpretations which management gave to you did not coincide with what you thought those interpretations should properly be, would you have swallowed them in your report?

THE COURT: Sustained as to form.

Q Would you have accepted them in your report?

MR. MANDEL: That is really --

MR. GRUTMAN: Judge --

MR. MANDEL: --irrelevant, your Honor, because even if he says he agrees with management's interpretation of the partnership agreement, that fact is irrelevant.

MR. GRUTMAN: Judge, as I understand what is happening here --

THE COURT: No, I will permit this question. If he disagreed with it, what would he do. That is what it amounts to.

MR. GRUTMAN: That is my question.

A If we disagreed with it and we did not think it was a reasonable interpretation, then we would either discuss it with them or come to an agreement or our accountant's report would so reflect our disagreement.

Q In this instance, did you accept the interpretation of management in the computation of all the partners'--

THE COURT: Sustained.

Q Was there a disagreement between Peat, Marwick and Newburger, Loeb concerning the proper interpretation of what the partners' net equity should be after distribution?

A We think it was a reasonable interpretation.

Q You told Mr. Mandel that the write-down of the losses on rentals which occurred in a particular year in accordance with generally accepted accounting principles are charged off in the year in which the loss occurs, is that right?

A Yes.

Q Now, if Newburger, Loeb in this year's accounting statement had not wanted to go along with that principle, would you have accepted that?

A If the settlement had been made but they did not want to reflect the loss, would we have gone along with it?

Q Yes, that's right.

A No.

Q Thank you.

And this partnership was always on an accrual basis, were they not?

A For accounting purposes, yes. For what we reported on, yes.

Q In the dealings which you had in the preparation of this statement, did you have any dealings with Messrs. Risher and Muh?

A Yes.

Q In the dealings that you had with Risher and Muh did you discuss with them any matters that might fall within what you accountants would consider to be discretionary matters?

A Not that I know of, no.

Q In the dealings that you had with Risher and Muh did you sense any attitude on their part of trying to be unfair?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Were you aware at the time this accounting statement was being prepared that a corporation was going to come into existence called Newburger, Loeb & Company, Inc.?

A Yes.

Q From an accounting standpoint, would it have been advantageous or disadvantageous to the corporation to maximize the write-downs for the year 1970?

A May I have the question again, please?

Q I will put it to you in this fashion if my question is not clear:

Would it have been, from a tax standpoint, more or less advantageous for the corporation to maximize the write-downs for the year 1970?

A From a tax standpoint?

Q Right.

A For the corporation?

Q That's correct.

MR. MANDEL: Your Honor, I don't think this is relevant.

MR. GRUTMAN: I think it is highly relevant as to motive and I offer this proof, your Honor, to demonstrate.

THE COURT: Overruled.

I will take it. Go ahead.

A In my opinion, I think it would be more beneficial to the corporation to have more assets.

Q More assets so that if there was a write-down in 1971 of a man who had a 16-2/3 percent interest in the partnership, wouldn't the corporation have been able to write off 50 percent of the loss for the benefit of the corporation whereas the partnership could only write off 16-2/3 percent?

A That sounds correct, yes.

Q That makes a difference I think of, what is it, 34 percent?

A (No response.)

THE COURT: Mr. Alvey, you had a little hesitation in that last answer.

THE WITNESS: I did not know the arithmetic, that was the only hesitation. He said 34 percent. 50 less 16-2/3 -- 33 and change, I guess.

THE COURT: You had better explain to me what your answer means, then.

THE WITNESS: To his question?

MR. GRUTMAN: Yes.

THE WITNESS: He just said there would be a difference between the taxes of 16-2/3 percent on a partnership basis as opposed to 50 percent on a corporate basis, and he said the difference would be 34 percent, and -- well, on reflection, I think the subtraction would be 33 and what, 1/3 percent?

THE COURT: How does this --

MR. GRUTMAN: I think what this shows is that it was to the advantage of the corporation to maximize the amount of assets rather than to maximize the amount of write-downs before the transfer, because if the corporation in the year following were going to have a write-down, the corporation could write off 50 percent, since the corporation's tax basis is different than a partnership.

THE COURT: I appreciate that argument, but it seems to me there is the corresponding argument that the corporation has to pay more for the assets in the purchase, so there is a mixed situation.

MR. GRUTMAN: We are talking about the valuation. It was to the interest of Risher and Muh and the corporation to have a higher capital account as an asset against which tax write-offs could have been taken in the following year, with a 34 percent greater benefit to the corporation than if the write-down had been made in the partnership.

THE COURT: I understand that far.

MR. GRUTMAN: And the deal, your Honor, had already been consummated at the time this was written up.

EXAMINATION BY

MR. SHAW:

Q When was the financial statement prepared, when in relation to December 31, 1970 was the financial statement prepared?

A Subsequent to December 31st.

Q March, April?

A Our accountant's report is dated March 25, 1971.

THE COURT: When had you done the figures that went into this?

THE WITNESS: All substantial work would have been done March 25th or prior.

Q Is it possible to begin the work until the close of the year 1970?

A Well, in conducting an audit there is always the possibility that we can commence some certain procedural work prior to the year end, yes.

Q But until the books are closed you cannot actually begin the work, is that true?

A We can begin certain, like I say, procedural work prior to that. We could never, financial statements cannot be drafted until the books are closed.

Q Can you recall when you began the work on this particular financial statement?

A I really do not remember.

THE COURT: Mr. Alvey, when you do one of these statements, do you get your financial input in the month of January?

THE WITNESS: Normally, yes.

THE COURT: You do not get your financial input in the month of March?

THE WITNESS: No. It begins accumulating directly after December 31st.

THE COURT: So you get your financial input basically in January?

THE WITNESS: Yes.

MR. SHAW: No further questions.

One minute, your Honor.

(Pause.)

MR. SHAW: Nothing further.

Thank you very much. You may step down.

Your Honor, I would permission to have the work papers that Mr. Alvey referred to sent by messenger marked and then offered in evidence. If there is any problem, let us handle it at that point.

THE COURT: Mr. Mandel, what say you to that?

MR. MANDEL: If we can get a representation that it is relevant, we can admit it in evidence.

MR. SHAW: Perhaps you can send it down to me with your letter saying that they are the work papers you referred to.

THE COURT: Send it to Mr. Shaw.

(Witness excused.)

MR. SHAW: Your Honor, I would like to read certain additional depositions.

MR. GRUTMAN: One minute with Mr. Alvey, please.

(Pause.)

MR. SHAW: Could you stay for just one second, Mr. Alvey?

I have one further question of Mr.Alvey.

THE COURT: All right. Mr. Alvey, I guess you will have to come back.

ESTILL ALVEY, resumed.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Alvey, I would like to direct your attention to Exhibit LLLLV.

Have you seen this before?

A Yes, I have seen a copy.

Q Now specifically, I would like to address your attention to Item 7, which refers to adequate vouchers or basis available to document this estimate.

Can you tell the Court whether you agree or disagree with that conclusion?

THE COURT: Well, I am going to sustain it without more of a foundation as to what is involved, and what he brings to bear on this subject.

MR. SHAW: All right.

Q Are you familiar with that item?

A I have seen the item on here, but I have not researched it in our work papers, no.

THE COURT: All right, let's not go further, Mr. Shaw. This is a waste of time.

Q Are you familiar with Item number 10?

A I have seen it, and the same thing, I have not researched it in the work papers.

Q How about Item number 11?

A The same.

Q 12?

A Same.

MR. SHAW: All right, thank you very much.

(Witness excused.)

MR. SAHW: We have depositions to read in evidence.

THE COURT: YOu have not finished with Stern yet.

MR. SHAW: I have.

THE COURT: You have? Then Mr. Mandel.

MR. MANDEL: Would this be the right time to put in a Stern answer to interrogatory?

THE COURT: It would.

MR. MANDEL: All right.

Interrogatory 16. This is contained in answers to interrogatories sworn to by Stern, Robert Stern , on November 29, 1974, postdating the deposition, and interrogatory 16A:

"Q Do you contend that Charles Gross personally made or personally caused or permitted Newburger, Loeb & Company to make material misrepresentations to the Board of Governors of the New York Stock Exchange?

"A A. No."

Mr. Shaw stopped reading, as I have it, on page 44, line 3, in which there was a question of written communications about assets and ability to pay.

I would like to continue with 44, line 4:

"Q Do you remember the substance of any oral statements you made? You do not remember the substance of any statements that you made, if you made any?

"A No, I do not."

Now, Mr. Shaw put in page 65, line 7 -- to line 7, and I would like to go on from there, starting with 65, line 7:

"Q So as far as you know, were you the only partner who authorized the Buckley settlement?

"A I do not know.

"Q Did you discuss the Buckley settlement with any of the other partners?

"A I do not remember."

Mr. Shaw, you put in 13 19. I go to line 20.

MR. SHAW: What page?

MR. MANDEL: Page 65:

"Q Did there come a time when you authorized or instructed anybody to commence a litigation against Charles Gross, Mabel Bleich or Gross & Company on behalf of the partnership based on the Buckley settlement?

"A No.

"Q Did there come a time when you authorized anybody on behalf of the partnership to prepare a summons and complaint in a federal action against Charles Gross & Company based on the assignment?

"A No."

I now go to 66, line 11:

"Q At the time the agreement of February 11, 1971 was signed, were you aware that the Buckley assignment would be used to resist the claims of Gross and Bleich for payment of their capital?

"A I can only asnwer it this way:

"I was aware of the claim, I did not consider it really one way or the other.

"Q Were you aware that Gross had stated that he would be entitled to immediate return of all of his capital if any transfer of the partnership's business was made?

"A Yes.

"Q Were you aware that some of the other parties to the agreement said they would not go along with the agreement if Gross got all of his capital immediately?

"A Yes.

"Q Were you aware that the proposed agreement might be prevented unless some way were found to get Gross' acquiesence or keep his capital?

"A Mr. Mandel, it seems to me this is a legal question. I am not a lawyer. I think I was aware that there might be a legal problem, but I am not a lawyer."

MR. SHAW: Legal "proposition," I have.

THE COURT: No, it has been changed.

MR. MANDEL: He changed it.

I go to page 69, line 22:

"Q Now were you aware that the Buckley counter=claims in the arbitration involved a churning claim?

"A I was aware of that at some point in time and I cannot answer, I cannot tell you when, when it came to my attention.

"Q Did you ever make an investigation or inquiry to determine whether there was any merit to the churning claim?

"A No.

"Q You had not opinion on that matter, is that correct?

"A That is correct."

MR. MANDEL: Mr. Shaw, did you stop on page 86 , line 24?

MR. SHAW: Correct.

MR. MANDEL: I would like to continue for a few questions and answers. I start on line 25:

"Q Did you take it up with any of the other partners?

"A I do not remember.

"Q Did Frank tell you whether he had told any of the other partners besides you?

"A I do not remember.

"Q Did you discuss with Frank whether some action should be taken about his accusations?

"A I do not think so.

"Q Did you discuss with any attorney for the partnership the question of what should be done about Frank's accusations?

"A I do not remember. Again, I have to say we were concerned with a lot of problems and we had a lot of pressure on us at that time."

MR. MANDEL: Now I believe Mr. Shaw, you stopped on page 89, line 17, is that right?

MR. SHAW: Correct.

MR. MANDEL: I would like to go on, line 18:

"Q Yes, and what did you say? Did you say you would join in it or did you say please do not?

"A I do not believe I responded one way or the other.

"Q Did you have any reason not to respond?

"A I can only answer I think at the time it came up I had a lot of other things on my mind which to me were much more serious in passing.

"Q Did you have any reason not to take seriously Frank's accusations?

"THE WITNESS: May I discuss this with my attorney?

"MR. MANDEL: I would prefer to let you give your answer."

MR. SHAW: Is there any reason why we need colloquy?

MR. MANDEL: I think it is relevant, that the witness would not answer that question.

MR. SHAW: Well, he did answer it subsequently.

MR. MANDEL: Yes, until he spoke to his attorney.

MR. SHAW: What is wrong with that?

MR. MANDEL: Then he said:

"A I cannot answer that question.

"Q Why not?

"A I guess because it is such a broad question that I find it difficult to answer specifically.

"Q Let me put it another way:

"Did you take Frank's accusation seriously?

"A I guess I will have to respond as I have before.

"I had a lot of other things on my mind. I perhaps put it aside because I had more to me more pressing problems to deal with."

MR. MANDEL: That is all I have --

THE COURT: All right.

MR. SHAW: We have Richard Stern, your Honor.

MR. MANDEL: Hold it for one second.

"Richard Stern

MR. SHAW: Beginning at page 3, line 25:

This is the deposition, your Honor, that was taken January 24, 1974:

"Q During what period were you a general partner in Newburger, Loeb & Company?

"A January 1, 1969 on.

"Q During the year 1970, what was your percentage of interest?

"A 3 percent."

MR. MANDEL: Are you stopping there?

MR. SHAW: Yes.

Line 19, page 4:

"Q Let us try to make it clear for a judge or magistrate who might hear this at a future date who is not familiar with the Newburger, Loeb arrangement.

"Is it right to say there was a specified amount of capital required for each percentage or portion of a percent of participations of a general partner?"

MR. MANDEL: I hate to interrupt,but I misheard your page. What page?

MR. SHAW: Page 4, line 19.

MR. MANDEL: Okay.

"A The essence of your question is, was there a required amount?

"Richard Stern

"Q Amount of capital in connection with the percentage of interest.

"A My recollection is that at some point either in 1969 or 1970 such a system was put into effect. As best as I can remember, the capital I had already put in exceeded the required amount for me."

MR. SHAW: Page 12 -- I'm sorry, page 11, line 11:

"Q That investment represented a very substantial portion of your total financial resources, is that correct?

"A Yes.

"Q In fact, during the fall of 1970 Newburger, Loeb was in very serious trouble and in danger of being wiped out entirely, is that correct?

"A The business was losing money and consuming the capital, yes. I am not sure I would use the words you used.

"Q Was the business in danger of being closed down by the stock market?

"A In late '70, yes.

"Q The business was in danger of being closed down by the New York Stock Exchange for insufficient capital, is that correct?

"A I think that was essentially true.

"Q If the business had been closed down, your investment would have been wiped out entirely, is that correct?

"A I guess that is correct."

MR. SHAW: Page 39, line 9:

"Q Regardless of whether it is repetition, can you tell me whether this line concerning the ball team was included in this memorandum, intened in this memorandum, Exhibit 87, zo refer to a grievance against Charles Gross?"

MR. SHAW: I think we can stipulate that the document being referred to is the handwritten notes of the meeting, I believe it was.

MR. MANDEL: 87, the little pieces of paper.

MR. SHAW: The little pieces of paper that came with those notes.

MR. MANDEL: The grievances and threats.

"A When you say 'was it intended,' do you mean at the time it was written?

"Q Listed as a grievance against Charles Gross.

"A I cannot say one way or the other. I do not think it is a yes or no question.

"Q Answer other than with a yes or no. Answer it as fully as you think appropriate.

"A As I stated before, it is a list of grievances

"Richard Stern

that was to the best of my recollection developed immediately prior to the September 3rd meeting and as I tried to explain earlier in other questions from you, I believe the individual items were basic here, basically being tied to specific acts of Mr. Gross.

"I do not know at the time I wrote it down whether what I was trying to make was a list against Charles Gross. I do not know whether that is what I had in my mind as to what the list was designed to be at the time I wrote it. It is clearly a list of grievances.

"Q The ball team turned out to be about what?

"A Yes.

"Q It involved a basketball team?

"A The ball team involved a franchise.

"Q Franchise for a basketball team?

"A I think I should interject here, I am probably the least sports oriented male American. I believe it was a basketball team, but I may be wrong, because I am not a sportsman.

"Q The ball team deal was done with the firm's money, is that correct?

"A I think so.

"Q Did Charles Gross make this investment without the knowledge of the other members of the firm?

"Richard Stern

"A I think for a fact that the deal was made before I knew anything about it. It came as a distinct shock that I was the owner of some action in a ball team and I was completely disinterested in sports, and I had no enthusiasm for something I had no conceptual feel for at all.

"Q Did any of your partners ever tell you that Gross made the basketball deal surreptitiously without telling the partners and getting approval?

"A The deal was well in the works before I had personal knowledge of it."

MR. MANDEL: I move to strike.

THE COURT: Yes, strike it out.

MR. MANDEL: That was not responsive.

"A I cannot say that anyone made a direct statement to me."

MR. SHAW: Line 7, page 42:

"Q I will try again:

"As you sit here today, do you have any information or belief as to whether the basketball deal made with Newburger, Loeb"--

MR. MANDEL: Hold on, please, I have to make a note. You are on 42, where?

MR. GRUTMAN: Line 7.

"Richard Stern

MR. MANDEL: Thank you very much.

"Q As you sit here today, do you have any information or belief as to whether the basketball deal made in Newburger, Loeb's name was made with proper authorization by the partnership?

"A I have only general impressions, I could not" --

MR. MANDEL: I object to that. General impressions is not evidence.

THE COURT: Sustained.

MR. SHAW: Next question:

"Q As you sit here today, is it your believe that Gross did the basketball deal without the knowledge and consent of the proper governing body of the partnership? I am asking your belief.

"A My problem is that it involved technicalities about proper approval, about how it was -- there are enough elements that I am uncertain about that the weight of my knowledge is that it was not properly entered into."

MR. SHAW: Line 11, page 43:

"Q For what reasons do you believe that Gross might have entered into the basketball team improperly?

"A Again my sense of the thing which does not involve specific authorization or specific documents, that this was an overwhelming liability that was entered into and I do recollect that Gross had suggested that this would be, this may be personal conversations with him, a quick and desirable financial commitment, a rapid turn-around and rapidly profitable endeavor. It turned out to involve from my recollection, massive commitments and massive partnership time and a long time to get out of which had not in fact been in the recommendation if you will.

"Q Apart from what you have said about the nature of the recommendation, do you have a belief as to anything else that he did in connection with the basketball deal that was improper under the partnership agreement?

"A I have had statements made to me from people more familiar."

MR. MANDEL: I am going to object to all of this as irrelevant and outside the scope. There is no counterclaim about the basketball team. There has been some testimony.

MR. SHAW: We have testimony on this.

THE COURT: Wait, let Mr. Mandel finish. You say it is outside the scope of the pleadings?

MR. MANDEL: Yes, the basketball team is not one of the counterclaims to counterclaims.

THE COURT: Is that so, Mr. Shaw?

MR. SAHW: My recollection is that it is, your Honor.

MR. MANDEL: Where?

MR. GRUTMAN: I cannot find that now. It is buried somewhere. I do not carry it in my pocket.

MR. SHAW: We have had testimony all along about this.

THE COURT: There is no point in reading in pages of deposition on how a basketball team was gotten if it does not have anything to do with the case.

MR. GRUTMAN: There is some evidence here, and you have taken documents as exhibits in evidence of loans made by Mr. Gross and commitments involving the firm, which your Honor, if you please, are a clearcut violation of Stock Exchange regulations.

These involve the collateralizing of fully paid customers securities.

THE COURT: We are not talking about that. We are talking about a basketball team. And we are also talking about testimony that frankly is the most amorphous sort of hearsay. I do not have a copy of it in front of me, but as I have been listening, this fellow is giving an impression here, a vague belief there,"I wasn't with the firm, but I got the feeling that," that is what this has been rolling on.

And it seems to me to have little weight of its own and if it is irrelevant because it does not bear on a pleading, let us not waste time with it.

MR. SHAW: Your Honor, it seems to me that now is hardly the point to stop about hearing testimony with respect to whether Mr. Gross was responsible for the decisions to get involved in the basketball team or any improper use of the customers' securities to borrow the money used.

THE COURT: Customers' securities is another matter.

MR. SHAW: Well this testimony bears upon that. If you specifically look at page 44, line 7, you will see the reference to the dipping into of customers' fully paid securities in order to carry the thing.

This relates also to the subsequent censure of Mr. Gross and the $25,000 fine.

MR. MANDEL: The censure of Mr. Gross is not part of this case.

THE COURT: Mr. Shaw, what issue in the pleadings does this bear on? Let us get down to the nitty-gritty as our former mayor used to say.

MR. SHAW: We have to get the summary of the pleadings, your Honor.

THE COURT: All right, then we will go from there into the pleadings. I will tell you what, we are going to

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stand in recess until ten after 2, and by that time if you can show me where in the pleadings this bears, I will be glad to consider it.

(Luncheon recess.)

AFTERNOON SESSION

2:10 p.m.

MR. GRUTMAN: Your Honor, you inquired before the recess where in the pleadings the excerpts in the deposition that Mr. Shaw was reading had any bearing. And I think that we have found that for you, and that is found in the eleventh defend offset and counterclaim beginning at paragraph 75, in which after speaking about the activities, it says:

"Gross made and caused and permitted the partnership to make material misrepresentations to the Board of Governors of the New York Stock Exchange, wherein false and untrue answers were given go special operating questionnaires, et cetera,"et cetera, et cetera.

It said, "He caused the partnership to be in violation of Exchange Segregation Rule 402 and Section 8 of the Securities Exchange Act of 1934 and Rule 8C-1 promulgated thereunder in that customers' fully paid for securities were pledged without the consent of the said customers as collateral for bank loans for the partnership."

THE COURT: You can get into that without getting into any responsibility for him, any actionable responsibility for him with regard to the acquisition of the basketball team.

MR. SHAW: That is the motive for so doing, your Honor.

MR. GRUTMAN: The claims, as I understand it, Mr. Gross' claims are baseless, and the thrust of the testimony is intended to demonstrate that there is a good faith belief that it was Mr. Gross' leadership, activity and actual conduct which was wrongful and harmful, and for which claim could properly be made against him.

I think it is within the pleadings under that provision which I have read.

MR. SHAW: It also comes in under the September 3rd memorandum, with the slip that was referred to by Richard Stern during his deposition.

Mr. Gross calls this a list of threats or offsets, or threats of claims, and since the issue is intended, since threats were made, I think it is fair for us to indicate that the threats were not baseless, that there is something to support it.

In other words, the righthand view of Mr. Stern for the decision to have gotten involved in the basketball team, which is referred to in that list, as well as the Ned Frank letter, Exhibit 51, is a correct one, rather than just a claim out of thin air.

THE COURT: Yes, but, Mr. Shaw, there still has to be some kind of pleading notice that Charles Cross has to defend on the circumstances of the acquisition of the basketball team.

MR. SHAW: There is pleading notice in paragraph 75, I contend.

THE COURT: I do not see it.

MR. SHAW: Also, I believe that there is an issue tendered by the defendants' pleading which alleges a conspiracy and that one of the purposes of the conspiracy was to make threats, and this is specifically one of the threats, the claim that Charles Gross has been responsible for the basketball team loss, so this is the other side of the defendants' allegations.

It is the other side of an issue tendered by the defendant. It is relevant two ways. In addition, your Honor --

THE COURT: Is it claimed that there was a threat to --

MR. SHAW: There was a claim against Gross.

THE COURT: Look, you are arguably relevant, and if we stay here until November we will try the basketball team. Go ahead.

MR. SHAW: Your Honor, all I want to do is read in a couple of pages of deposition.

THE COURT: Then I am going to give the other side an opportunity to develop the basketball team. You just cannot open up one thing. You cannot say I want ten seconds of testimony and that is the end of it.

I do not know. Do you need an amendment, Mr. Mandel, to deal with the basketball team? If you do, I will give it to you.

MR. MANDEL: Your Honor, we can dispose of that issue very quickly, in a minute. If these gentlemen want to stick their necks out about the basketball team, that is one thing. If they are trying to escalate from one matter to another, I think that's another thing. If it is just the basketball team that they say was unauthorized, though it is not in the pleadings, and your Honor things it may be arguably relevant, we can --

THE COURT: I can see it is arguably relevant because you charge threats to him to get him in line. That is an item in the Ned Frank letter. They want to show that is a bona fide statement rather than a threat. I can see that that makes it arguably relevant.

MR. MANDEL: Then I think they are going to try to escalate from that to violation of Exchange segregation rules, because they will say that had something to do with the basketball team.

MR. SHAW: Rather than imagining what we might do next, can we proceed?

THE COURT: We will proceed step by step.

If you need further time to answer the basketball team, you shall have it.

Proceed.

MR. SHAW: Page 43, line 11. I believe it is 43, line 11:

"Q For what reasons do you believe that Gross might have entered into the basketball team improperly?

"A Again, my sense of the thing which does not involve specific authorization or specific documents, but this was an overwhelming"--

MR. GRUTMAN: This has all been read.

Where we begin in on page 44:

"Q Apart from what you have said about the nature of the recommendation, do you have a belief as to anything else that he did in connection with the basketball deal that was improper under the partnership agreement?"

MR. MANDEL: This is now the next step that I had just predicted. Overlapping bank loans and a dipping into customers' fully paid for securities.

I have had statements made to me by other people. It is poison, it is hearsay, it is prejudicial and put in for no other purpose.

MR. SHAW: This is hearsay, there is no question regarding that. Mr. Therese has talked about it. It would be relevant only with respect to the issue of malice or intent.

THE COURT: Then that answer will not be received.

MR. SHAW: Page 45, line 9:

"Q On Exhibit 87 for identification, under the heading, "Grievances," appears a line which begins"--

THE COURT: That is the little piece of paper?

MR. SHAW: Right.

"Q The lies NYSE, do I read that right?

"A Yes, I believe it says that.

"Q Line 20. You are right. Will you explain what that line means? Will you explain that to the extent you are able?

"A I think I must have been informed at this point that we had misrepresented to the Stock Exchange, obviously something having to do with our operations."

MR. MANDEL: Your Honor, I am making the same objection.

THE COURT: Yes, sustained.

MR. SHAW: Same statement, your Honor.

Page 46, line 23:

"Richard Stern

"Q What other items were there that you know of that were lies to the Stock Exchange?

A I was not seeing the special financial questionnaires, from general knowledge now I believe the capital position may have been overstated during the period. I think there were" --

MR. MANDEL: Your Honor, I object to that.

THE COURT: Strike the answer.

Mr. Shaw, there is nothing in there but sheer speculation.

MR. SHAW: Just with respect to intent, your Honor. On the issue of malice.

MR. MANDEL: This is not even Mr. Shaw's client.

THE COURT: This was being offered on the question of proof of the basketball acquisition as being a --

MR. SHAW: We are off the basketball team, on to the question of censure and the threat to expose lies.

THE COURT: You still have to have competent testimony.

MR. SHAW: It seems to me, your Honor, that it is relevant with respect to what his intention was. Did he have a basis for making these statements, period.

Because after all, this is a conspiracy --

THE COURT: Are you going to prove that in fact there was a basis?

MR. SAHW: I think that the relevant proof here your Honor is that persons in the company gave him information which he reported.

MR. MANDEL: Your Honor, Mr. Shaw is now trying to prove that Mr. Stern, who is not his client, acted in good faith during the conspiracy.

Is that right?

MR. SHAW: I must, because if he acted in bad faith and there is a conspiracy, it relates to my client.

MR. MANDEL: On the basis of hearsay testimony, with unnamed people, and unidentified conversations.

MR. SHAW: Because the man is accused to have made a threat and to be actionable it seems to me it must be established that there was no basis for it, and if there is a conspiracy, all conspirators are liable.

It seems to me that the circumstances, the information that he had, what he knew, is relevant. Otherwise you merely have the fact that he made the threat.

THE COURT: The way the dust is going to settle here is that he is going to make the statements that he had certain unassignable-to-a-source information, but you are never going to prove that the underlying information is true. Is that what it amounts to?

MR. SHAW: With respect to the New York Stock Exchange censure, your Honor, I think that we are to the point where we can make an argument, a fair argument, that Mr. Gross either knew or should have known that the false statement in the questionnaire of the summer of '69 for which the firm was subsequently censured, a censure addressed to him, was a statement which he knew or should have known was false, where he reported only one difference, and whereas in fact there were close to 10,000 differences.

THE COURT: How about any of the other ones? How about the dipping into customers' securities to fund the basketball team? Are you going to prove that that was an unauthorized account of Charles Gross competently?

MR. SHAW: Mr. Therese has testified that this was done, it is my recollection.

THE COURT: He testified that what was done?

MR. SHAW: That the customers' securities fully paid for customers' securities were used to fund the purchase of the basketball team.

MR. MANDEL: That is not my understanding of the testimony, your Honor, and there was definitely no connection with Gross.

THE COURT: I didnot catch that as being attributable to Gross. What about the basketball team? Is there going to be any proof that the basketball team was a malpractice on his part attributable to him?

MR. SHAW: I think that the proof is, what I have seen, indicates that the decision to do this was primarily a decision made by Mr. Gross, that after a period of time he had effected control over the company and he made a series of decisions including this, which proved to be disastrous.

THE COURT: Is that going to be something that is chargeable to him as a wilful maladministration; business mistakes are made by businessmen every day.

MR. SHAW: I wouldn't say it is wilful.

THE COURT: And do not make a cause of action.

MR. SHAW: I would say it is a situation of maladministration, much the same as I say the back office loss was not wilful, it was a case of maladministration.

However, there was an allocation, there was an adjustment, it considered a set-off in determining what the partners' capital accounts were.

THE COURT: What I am trying to get at is, does anybody claim, even at best, that what Charlie Gross did with regard to the basketball team is more than poor business judgment of which businessmen are guilty every day of the week and nobody sues them?

MR. GRUTMAN: I will answer that.

That may have been poor business judgment in the first instance. But the testimony yesterday was that this man who made a mockery of the executive committee, who ran it wilfully as he wanted to in order to support that bad judgment used customers' fully paid securities as collateral and that is a no-no. That is inexcusable.

THE COURT: You are going to the second step, Mr. Grutman, and I have not gotten off the first step , which was whether the purchase of the basketball team was a legal no-no.

MR. GRUTMAN: No, it is not an illegal no-no, it was just bad judgment.

THE COURT: Then we do not have a cause of action based upon the basketball team, no matter how you look at it

MR. GRUTMAN: That is true, Judge.

MR. SHAW: No, no, please.

THE COURT: Look, I am going to take Richard Stern's statement and assign it such weight as I feel it is entitled to receive, based on the theory that he has testified under oath that this is what he was informed. Beyond that, I go not one step farther at this point.

MR. GRUTMAN: Even though those accounts may be the accounts, the accounts of pleding those securities may have been responsible for the censure and fine, irrespective of the plea which Mr. Gross took?

THE COURT: I am not aware of that at this point. I did not catch Mr. Therese having said that.

MR. GRUTMAN: He did not say that, Judge. It is in the record here. The censure and fine.

THE COURT: I appreciate that, attributable to the partnership.

MR. GRUTMAN: Correct, as to the partnership, although the claim is made against Mr. Gross and the arrangement made --

THE COURT: And another partner, the one in charge of the front and one in charge of the back.

MR. GRUTMAN: Right, Judge, and I also understand further that the way in which this has been construed by you is that Mr. Gross in making his arrangement with the Stock Exchange paid the $25,000 assessed against him on the basis that there was bad management, but I do not think the plea or the copping out that was done at the Stock Exchange is binding on this Court in looking into the reality of what the acts were that Mr. Gross did.

THE COURT: We are getting way off the field.

MR. MANDEL: Your Honor, I think Mr. Grutman's statements of fact may be misleading the Court.

The only cause of action here regarding a censure is a censure against the firm in which it is stated that Gross was responsible for that censure and is therefore responsible for the $50,000 fine paid.

Now, that censure did not encompass the pledging of customers' securities. Mr. Grutman unintentionally, no doubt, is mixing up the subjects of the firm's censures and Mr. Gross' personal censure for which Mr. Gross paid.

Now, the only reason why they were permitted to touch on the question of Mr. Gross' censure was the argument, that this is available to impeach him.

Does your Honor remember that?

THE COURT: I remember that.

MR. MANDEL: So that now they are trying to switch around and show your Honor Gross' personal censure, slide that into the firm's censure with an element of confusion.

Now, that was done in the pleading, and that we believe was done maliciously in the pleading.

THE COURT: You are saying that paragraph 76 does not include paragraph 75 in essence?

MR. MANDEL: Yes. What I am saying is that insofar as the firm's, as the counterclaim talks about the segregation charge, it is misstating the subject of the $50,000 censure and fine.

THE COURT: You say that is not included in the $50,000?

MR. MANDEL: Correct.

THE COURT: So the partnership did not pay $50,000 by reason of the violation of the segregation rule?

MR. MANDEL: That's correct.

MR. SHAW: I think the point Mr. Mandel is making that the partnership paid $250,000 by virtue of the false statement in the SOQ during the summer of 1969 and another matter.

THE COURT: He is just trying to correct the record here.

MR. SHAW: I agree to that.

THE COURT: You agree to that. In any event, I am going to take Richard Stern's statements as his statements, being his state of mind, testified to under oath on a particular day.

MR. MANDEL: Without any proof of the facts thereof.

THE COURT: I said not one step further as of this point. If they can be connected to something else , that is another matter.

MR. SHAW: Where am I?

MR. MANDEL: 47.

MR. SHAW: What line?

MR. MANDEL: I think you were reading from general knowledge, I believe, or something.

"A I was not seeing the specific financial questionnaires, special questionnaires from general knowledge now."

MR. MANDEL: Where are you?

MR. SHAW: Top of page 47.

MR. MANDEL: Line what?

MR. GRUTMAN: 2.

MR. MANDEL: YOu started on 46, line 25, right?

MR. GRUTMAN: Are you at 47, line 2?

Mr. Mandel, I am going to continue:

"A -- from general knowledge now I believe the capital position may have been overstated during that period. I think there were censures which applied to the August, September period relating to said segregation of securities and record keeping.

"Q August and September of what year?

"A I was thinking of '70, but it may have been '69."

MR. MANDEL: Are you stopping now?

MR. GRUTMAN: Why don't you let us do it and you do what you please.

"Q Going back to the conversation"--

MR. MANDEL: Excuse me, you skipped something.

MR. SHAW: Line 20, page 47.

"Q Was it the thrust of the conversation that the lies to the New York Stock Exchange and failure to notify the Stock Exchange of death were the particular wrongdoings of Charles Gross?

"A No, I did not think that. I don't know how I could identify anything as being the thrust of the conversations.

"Q You don't know whether this particular line, 'lies to the New York Stock Exchange, failure to notify of death," was a grievance against Charles Gross particularly."

MR. SHAW: Now we are skipping colloquy.

"A I think it was in the sense he was managing partner and probably the signatory of the report. I recollect there was a question over the word 'we' which I used in the sense that the partnership became a party or committed an act by virtue of the reports that were made."

MR. SHAW: Page 53, line 2, and this relates to Bracker.

"Q Please read the next line of Exhibit 87.

"A It appears to read 'Hook up with end' which I take to be 'with end' --

MR. MANDEL: Excuse me, just so we keep the record clean, your Honor, and there can never be any doubt--

MR. SHAW: This is with respect to intent and malice, period.

MR. MANDEL: No proof of the assertions made therein.

MR. SHAW: Correct.

MR. MANDEL: Although I think this is one of the counterclaims to counterclaims.

"A Which I take it to be with and then the word 'swindler' and then a parenthetical phrase which I take to be 'without contract'.

"Q Can you explain that?

"A I believe I know who the reference is to here.

"Q Will you please explain it as well as you can?

"A I believe the reference was to eventually enter into and taking into partnership of a California individual named Lou Bracker who was taken in on the strong recommendation of Mr. Gross.

"At this point I am not quite certain what the parenthetical phrase in the line means.

"Q Are you able to state what it was that Gross was supposed to have done that was wrong in connection with the Bracker matter.

"A The recollection is that he strongly recommended that Bracker be introduced as a partner despite information that had been developed by other partners, specifically Mr. Frank, suggesting that this was not a desirable business relationship or desirable entrance into the partnership.

Subsequently, this was proven correct.

"Q Do you happen to know how it was determined whether the partnership would follow Frank's advice or Gross'?

"A In part, it was a matter of personal enthusiasm. It was not an executive committee, where individuals were in a position to be swayed by personal enthusiasm."

MR. MANDEL: Are you stopping there?

MR. SHAW: Yes.

Page 80, line 4:

"Q We come to the last item. Would you read that please?

"A The several lines read trading in arbitrage accounts, lost 150,000 or so. Ignoring contractual prohibition.

"Q Is that a grievance against Charles Gross?

"A This can be included as a grievance against Gross. There are several elements here. Trading, I think, refers to trading activities. At about this time I discovered Mr. Gross had engaged in a stock called City Investing, using partnership funds involving a considerable amount of money and ignoring a partnership contract prohibiting this sort of activity without executive committee approval.

"It was a very unsuccessful series of trades. The other half of that is an arbitrage trade.

"Q Stop there, please. We will come back to that. I would like to take about the trading now.

"A Yes, fine."

MR. MANDEL: Just "Fine."

"Q Did you say you discovered the trading by Gross in City Investing?

"A By 'discovered' you mean with either one?"

MR. SHAW: Line 24, page 81:

"Q Fine. When did the trading in City Investing come to your attention?

"A It was in about this time.

"Q Which time?

"A In about -- at the time that this --

"Q Exhibit 87?

"A Yes."

MR. SHAW: That is the end of Mr. Richard Stern's deposition, your Honor.

Mr. Mandel?

MR. MANDEL: Nothing.

MR. SHAW: At this point, your Honor, I would like to call Mr. Ragusin, though I believe he stepped out for a few minutes to use the telephone. Will somebody go outside and call him?

WILLIAM J. RAGUSIN, called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Ragusin, how are you employed presently?

A I am employed by the trustee in the Chapter X reorganization of Investors Funding Corporation of New York.

Q And would you -- I wonder if I could save time by asking you, Mr. Ragusin, to briefly describe your academic and professional background.

A I am a financial executive consultant by experience and background. I am a certified public accountant, State of New York.

I am a registered representative, registered principal. I have two masters degrees from Columbia Undergraduate School of Business, MS in accounting, MBA in business subjects.

I have worked for a variety of companies, and I had public accounting experience of about six and a half years with Peat, Marwick, Mitchell & Company.

Q Now, have you been involved in any broker-dealer liquidations in the past?

A Yes, I have.

Q Will you describe these to the Court?

A I have been involved and responsible for three broker-dealer liquidations, commencing in the middle of 1970 I was responsible for the liquidation of Orvis Brothers & Company.

Subsequent to that date and again for the New York Stock Exchange for whom I was employed as a consultant to do Orvis, I continued on with the liquidation of First Devonshire Corporation.

Subsequent to that and for a trustee but under Sippick Security Investor Protection Corporation, I was responsible for and managed the liquidation of Morgan, Kennedy & Company.

Q Will you describe for the Court what your duties were in relation to the liquidation of these companies?

MR. MANDEL: Excuse me, Mr. Shaw.

Your Honor, I have an objection to the entire line of testimony which I would like to put on the record now in the interest of saving time:

My understanding is that Mr. Shaw is offering the testimony of this gentleman as an expert as to what would have been realized if Newburger, Loeb had been liquidated instead of making the deal that it made on February 11th.

I think it is Mr. Shaw's theory that the damages to which my clients, the defendants in this case, are entitled, is limited to what they would have received in liquidation.

I believe that this theory is utterly baseless because the liquidation did not in fact occur and despite the liquidation the partners would have been liable over to my clients.

Furthermore, the record here establishes without any doubt that the deal went through, the liabilities were assumed by the corporation, the partners and the partnership remained liable, and the corporation would have and could have paid except for the conspiracy and the counterclaims which were interposed.

In view of those facts, I believe that Mr. Ragusin's testimony is entirely irrelevant.

THE COURT: I note your objection.

Go ahead.

MR. SHAW: Thank you, your Honor.

Q Would you describe what your functions in relation to the liquidation of these companies were, what did you do?

A I was responsible for the liquidations. I managed the liquidations. I hired the staff I needed. Terminated employees where I went into an active situation. I had to realize on assets. I had to settle out liabilities.

You are involved in every asepct of a business except that you are putting it out of business.

Q Over what period of time did that take in relation to Orvis Brothers & Company?

A Orvis Brothers took approximately eighteen months, fifteen months to eighteen months to complete.

Q Can you explain the nature of the business generally of Orvis Brothers?

A Orvis Brothers was a partnership, members of a number of Exchanges, including the New York Stock Exchange. I guess there were about thirty-five partners.

It had ten offices. I think it had about 22,000 customer accounts at its peak. And approximately three to four hundred employees at its peak.

Q And will you tell us approximately how long the job of liquidating that took place with respect to First Devonshire Corporation?

A First Devonshire took approximately one year.

MR. MANDEL: One year?

THE WITNESS: One year.

Q And would you tell us something with respect to the size of that business?

A That was a corporation in bankruptcy. It was considerably smaller than Orvis Brothers. I recall about seventy-five employees at the time I became active in it. There was a trustee appointed and he had a problem getting the New York Stock Exchange support in the beginning, for about six months nothing really happened there.

So when I got into the situation, a number of people had already gone, so I really don't recall how many people in total in its hey day.

MR. MANDEL: Will you speak up so I can hear?

THE WITNESS: Yes, I will.

Q How long did the Morgan & Kennedy Company liquidation take place?

A Morgan, Kennedy liquidation took about eighteen months. Morgan, Kennedy had approximately four offices, had about fifty-five employees. It was a member of the PBW Exchange and did a sizeable retail and over-the-counter security business with a number of underwritings.

They handled a number of underwriting issues, five or six that were fairly active.

Q Now, am I correct in assuming that your activities in relation to the liquidating of companies is limited to the liquidating of broker-dealer or firms in the securities business?

A Yes, my experience has been strictly securities industry.

Q And are you still engaged in that, sir?

A The current situation is a reorganization in Chapter X at the moment, so I could not classify it as a liquidation.

Q Of what company is that?

A Investors Funding Corporation of New York, which is not securities industry.

Q And did you begin engaging in this field in 1970?

A Yes.

Q You previously examined the Peat, Marwick financial statements dealing with Newburger, Loeb for the year ending December 31, 1970, have you not?

A Yes, I have.

Q I place before you Defendant Finley Exhibit I, and ask you whether this is the document that you just referred to.

A Yes, it is.

Q And did you analyze that document?

A Yes, I did.

Q And in addition to that, did you have access to any other documents?

A I had supplementary information in addition to this document that I utilized, yes.

Q Was that a schedule of lease liability?

A Yes, a schedule of lease liabilities, a schedule of litigation, and a few other items.

Q All right.

Now, is that schedule of lease liability as set forth in the financial statement?

A The schedule I worked with I think is more detailed than is available.

Q Do you have that schedule before you?

(Schedule produced.)

MR. MANDEL: Is it in evidence?

MR. SHAW: I believe it is in evidence already.

MR. MANDEL: Well, let us find out. Let us see it.

MR. SHAW: Let us see yours.

(Pause.)

MR. SHAW: Same thing as Exhibit 123, your Honor.

Q And you also say that there is a schedule of litigation. Would you produce that?

A I have my notes added to that.

(Produced.)

THE COURT: Why don't we mark the witness' copy and let us go ahead.

MR. SHAW: I was just trying to find out -- may we mark this as an exhibit for identification.

(Plaintiff's Exhibit number 128 was marked for identification.)

Q Based upon your experience in the liquidation of broker-dealers and based upon your opinion and experience as an accountant, do you have an opinion with respect to what would have been realized in the event there had been a liquidation of Newburger, Loeb & Company on or about February 10, 1971?

A I took the Peat, Marwick --

Q Just answer it yes or no.

A Yes.

Q And what in your opinion would have been realized in the event of such a liquidation?

A In my opinion, the subordinated lenders would have realized a little over $700,000, and the capital positions would have had a zero valuation.

Q Have you prepared a schedule setting forth --

MR. MANDEL: Excuse me.

Your Honor, may I object on the ground that there is an inadequate foundation because apparently the witness is also relying on the schedule of litigations.

MR. SHAW: Which is in evidence already as part of Exhibit Y, your Honor, and I refer to Part 2, the transfer agreement, it is a schedule annexed to the transfer agreement, Schedule C.

MR. MANDEL: I will accept that.

MR. SHAW: Schedule C and D.

MR. MANDEL: I will accept that representation and on that basis the exhibit for identification may be marked in evidence, but I think that still does not qualify this witness as an expert to testify as to the outcome of litigations.

MR. SHAW: Liquidation. I have not gotten into that yet. We will sooner or later. We are not at that point yet.

THE COURT: I will permit him to go ahead at this point.

Q I think there is a question outstanding.

(Record read.)

Q Setting forth the computation which you have made which is your opinion?

A Yes, I have.

Q And do you have a number of copies of that schedule?

A Yes, I do.

(Produced.)

MR. SHAW: Your Honor, I am giving the Court one of the schedules. I am giving Mr. Mandel another schedule, and I am asking another copy be marked Plaintiff's Exhibit 129 for identification.

(Plaintiff's Exhibit 129 was marked for identification.)

Q You have indicated that you have an opinion as to what the effect of liquidation would have been then and you mentioned a sum with respect to the subordinated lenders.

Would you tell us how you reached that conclusion?

A I reach it through the schedule which is number 129 wherein I placed a valuation on the assets, on a liquidation basis; I reflected a liability position, also on a liquidation basis, and the net effect of those two series of valuations, one against the assets, one against the liabilities, is to produce a deficiency of an excess of $2,000,000 that has to be adjusted against the capital and subordinated liabilities category.

Q Are you referring to the figure at the bottom of the column captioned provision for liability and capital adjustments.

A Yes, the $2,038,686 footing at the bottom of that column is spread among the capital and the subordinated capital sections and it is first spread entirely against general and limited partners' capital and then whatever the balance is is spread against the subordinated accounts.

Q Will you tell us in detail how you reached that figure of approximately $2,000,000?

A Yes, I can.

It is really composed of two elements; an evaluation of the assets and an evaluation of the liabilities.

The asset valuation has an adjustment of 578,686. It is in the column headed "Asset Valuations" and what I have done with those numbers is apply the numbers there.. in that column against Peat, Marwick's figures to arrive at a realizable value, asset value, which is in the extreme righthand column.

Q Now, will you go from item to item, first starting with cash. Obviously there is no adjustment.

A I made no adjustment on cash. I made no adjustment on the receivable from clearing broker. I made a small adjustment against receivables from other brokers and dealers and clearing organizations..

Q Will you give us the basis for that small adjustment?

A That is a conservative estimate. In other words, I determined that I would realize $16,000 out of a full carrying value by Peat, Marwick of 17,517.

Q For what reason, sir, in the event of liquidation?

A On the event that some broker-dealers would be a problem collecting from, the clearing organizations. My experience has been that this is an extremely conservative write-down, the adjustment is conservative.

Q Would you continue?

A At best, I would consider that 16,000 would be realizable from that category.

On the market value of securities and partners firms and subordinated accounts, since I stated already market value by Peat, Marwick, I just put in a provision for what would amount to selling costs. which is approximately one percent of the gross asset value.

Q The cost of selling those securities?

A Cost of selling those securities.

Other current assets, which is a lot of miscellaneous items, I again feel I was very conservative in the write-down of the adjustments I made of 10,000.

Q What do you mean by miscellaneous items as an asset?

A That would be things like prepaid insurance and possibly some small receivables or advance type things.

Q How would liquidation have an effect in reducing the value of that as an asset in your opinion?

A Well, there are frequently offsets that come up. Secondly, there is a collectability problem against some of those items.

Q And you reduce that by approximately $10,495, correct?

A Yes, which is an estimate on my part.

Q Will you continue.

A Membership in exchanges at latest sales prices I left intact because that is at the sales price as verified by Peat, Marwick.

Furniture, fixtures, leasehold improvements has a very sizeable adjustment. It is from my experience. The problem there is really two-fold or even three-fold.

Number one, the number that appears on the balance sheet is merely original cost less a bookkeeping adjustment for depreciation. It never purports to be what would be saleable value or fair market value.

Q What do you mean by saleable value, to whom?

A Saleable value would be realizable value, would be a value that someone would be willing to pay for the items that make up that category.

Q What market exists according to your experience for that sort of item?

A There is always a limited market. There was a particularly limited market back in '70, '71, '72, when there were many Wall Street firms liquidating. And the other problem there is that leasehold improvements are just not saleable. More often than not, they are abandoned because they represent items that are fixed to walls and buildings and fixtures and carpeting and things of that nature that have virtually no value to somebody except someone who might reoccupy the premises.

Q Is that based on your experience as a liquidator of brokerage firms?

A Yes, it is.

So I subscribed a sizeable adjustment to that and showed a net realizable value of $90,000, which is about 15 percent.

Q In your opinion, is that a conservative adjustment?

A I would call it conservative-realistic. I certainly --

MR. MANDEL: Excuse me, may I interrupt for just one second? I hate to do this, but I am not sure I understand.

You marked the furniture and fixtures down to 90,000, you said 90,000.

MR. SHAW: That's correct.

THE WITNESS: That's correct.

MR. SHAW: You can see it from the column.

THE COURT: Mr. Mandel, the column "Asset Valuation" should probably read "Asset Devaluation."

MR. MANDEL: Yes, I think so.

THE WITNESS: But the line ahead of it says "Liquidation Adjustments and Provisions Against Asset Valuations."

It is a play on words.

THE COURT: This is subtraction from the value of the assets.

MR. MANDEL: I understand now.

A The extreme right column is your net number, which in this case is $90,000.

Q Would you continue?

A Next is securities not readily marketable, at fair value.

There I reflected what I would consider to be the cost of selling those securities.

Q You mean commissions?

A Commissions and even in this category I was conservative and possibly overstating the value. There may be legal expenses in getting rid of non-readily marketable issues.

Q Would you continue?

A Receivable from former and general partners, I took a -- obvious from the calculation -- a 50 percent valuation. I wrote it down by 50 percent, considered 50 percent realizable and I consider this conservative.

I consider these items difficult to collect on, and I took an opinion valuation of 50 percent on this.

Q What was the basis for your opinion?

A My experience and I intended to be conservative in the write-down.

Q What is the next item?

A The next item I left at face value. It is a subordinated loan from a clearing broker which was their clearing broker and I did not make any adjustment against that on the assumption that that is as reflected in the Peat, Marwick statement and fully realizable even on liquidation.

Next item I have is receivable from customers unsecured, I made a relatively small adjustment of 20,000 some dollars against that, and that category I had some additional information concerning some amounts that had been realized from experience, from the firm's experience.

Actually, I believe about $75,000 had been realized which left about 40,000 unrealized and I took 50 cents on a dollar on that as an adjustment which I think is very conservative.

Q Will you continue?

A The cost of securities purchased by clearing broker I left as a realizable asset.

And miscellaneous category, I took 50 percent, roughly 50 percent adjustment.

Q Based upon your experience in the liquidation of brokerage firms, was it your conclusion that on liquidation the assets per the Peat, Marwick statement would have been written down from approximately $3,699,156 by $576,686 to $3,120,470?

A Yes, that is my opinion.

Q Now, liquidation also has an affect on liabilities, correct?

A Yes, it does.

Q Based upon your experience, did you draw or make certain conclusions with respect to what the effect upon liabilities would have been in the event that a liquidation on or about February 10, 1971 --

A Yes, and they reflected on the same schedule on the next category.

Q What do you mean by "payable to customers"?

A Payable to customers, credit balances that are due to customers.

Q Would that have been affected?

A I would say no, those would have been fully payable?

Q Would you continue?

A Payable, well the next five categories are items that flow right through from Peat, Marwick's statement. I did not make any adjustments because I had no reason to think that there would be any savings or additional liability on those categories. What I did do though was make certain provisions, number one, the provision for settlement of lease obligations.

I had a valuation of 177,109, and that was derived from --

Q I'm sorry, isn't that -- didn't you skip a line? Isn't there a figure prior to that, provision for liability or settlement for pending litigation?

A I am sorry. Maybe I am misreading the line. Yes. I took the wrong description against the 177,109. What I should have said is that the provision for liability or settlement for pending litigation rather than the leases. That is the next category. My error.

But I am talking about the 177,109.

THE COURT: Reserved for contingencies. Do you carry a reserve like that when you are in a bankruptcy or liquidation situation?

THE WITNESS: Actually that is from Peat, Marwick's financial statement.

THE COURT: I know, but that is a going business with a reserve for a going business problems. You are now giving us your view of what it would be if you were to liquidate.

THE WITNESS: That's correct.

THE COURT: Would you carry the same Peat, Marwick contingency into this situation?

THE WITNESS: I did because really when I examined the pending litigation information that I had, this 59,000 of Peat, Marwick's already provided for certain of those items, so I did not tamper with Peat, Marwick's number. I left it intact, because they did a much more in-depth audit and verification of balance sheet than I was able to. I left that number intact, but I left those items that they provided for out of my calculation. I picked up additional items. And that comes from the litigation sheet, which I believe you put in as an exhibit here.

And I would have to refer to that sheet to give you the specifics, but it comes from that sheet. I have it here. 128. I used the data I had been given and provided numbers for settlement or losses based on the open litigation. There are about twenty items I had to consider here and I came up with a provision of $177,109 which I reflected on this statement.

MR. SHAW: I offer this in evidence. I believe it is the same thing as Y.

MR. MANDEL: If it is the same as Y, I do not object to it. If it has got something else on it, then I object.

MR. SHAW: All right, I offer this in evidence. No objection.

MR. MANDEL: The same as Y? I understand it has notes added.

MR. SHAW: I am excluding the notes.

MR. MANDEL: All right. May we see it when you are finished, Mr. Shaw?

MR. SHAW: It is the same, except for the column captioned "Estimated Liability And/Or Settlement Value."

MR. MANDEL: To save time, since the other document is already in evidence, why don't you just refer to the one that is the schedule to the transfer?

MR. SHAW: Let me have that so he can use it to refresh his recollection.

Q I am placing Exhibit Y before you and I ask you to just refer to Exhibit Y, although you can refresh your recollection by looking at 128 for identification.

Is Exhibit Y, Schedule C, Part 2, the same as 128 for identification, with the exclusion of the column captioned "Estimated Liability And/Or Settlement Value," and your handwritten notes?

A There are some minor differences.

Q All right; just forget this, then.

Now, will you tell the Court how you computed the figure of 177,109 as a liability which would have, in your opinion, occurred in the event there had been a liquidation?

A I used the details listed on the open litigation, and I subscribed a settlement value or a provision value to the items thereon, and there are approximately ten or eleven items that have a dollar amount next to it and the aggregate of those ten or eleven items is 177,109.

Q Now, will you continue -- and that is how you arrived at that figure, correct?

A That is correct.

Q Now, would you continue with respect to lease obligations?

A With respect to lease obligations, I had a schedule of leases. I evaluated what it would cost to terminate those leases, and I made a provision for settlement of those obligations, in the amount of $750,000.

Q And was that based upon your experience in liquidating brokerage firms?

A Yes, it was.

Q And what has your experience been with respect to settling lease obligations in the liquidation of brokerage firms?

A Well, lease obligations you will usually abandon the space and then you attempt to negotiate some type of settlement with the landlord. In this particular case, it is more difficult than a corporate form because the partners are liable, and the landlord has a much better recourse action, because he can go against the partners and it makes the negotiations a lot more difficult.

We had that similar situation of course in the Orvis partnership. The other two entities I liquidated were corporations and it was not quite as difficult and they were both in bankruptcy also.

Q And how do you compute the figure of $750,000 as a liability with respect to the settlement of lease obligations of the partnership?

A Well, I tried to be conservative in what I thought was the minimum that could be provided for this purpose. The total outstanding lease obligations until expiration is 3,200,000, among about ten or twelve locations.

Also, I had another number that had some significance, the annual cost for 1971, the year subsequent to the date of this balance sheet and the year during which liquidation would occur, was about $536,000. So what I did was to take roughly a year and a half worth of annual costs and use that figure. That figure has some support in bankruptcy where settlements are frequently made for one year's worth of lease obligations after the premises are vacated.

You have to recognize that on a lot of these premises could not have been literally vacated overnight. The key would have been turned back to the landlord even on abandonment a number of months after December 31, 1970.

Q What has been your experience in Wall Street?

A There would have been at that time the tendency to abandon the space because it was very difficult to find tenants. Tenants, even existing company that were still in business, were relinquishing space rather than taking on additional space.

Q And do you have any opinion as to the likelihood or possibility if there had been a liquidation of securing substitute tenants for that space?

A I would be very pessimistic about achieving that because at that time I was looking for tenants for space. We abandoned it. It was virtually a hopeless situation for brokerage space, particularly.

Q What effect if any does that figure, with respect to the settlement of lease obligations have on the individual partners' liability for the balance of the lease term?

A I would assume there would be continued obligation on the part of the partners for the lease obligations; and the landlords would have recourse to recover the deficiency against the partner.

Q Will you go to the next item?

A The next item is estimated employee severance and vacation pay costs, and what I did there was obtain the payroll numbers and I provided for two weeks' severance pay and one week vacation pay for the employees on the payroll in December 1970.

Q In other words, they would have all have left at once?

A No, but perhaps a small amount, a small handful would have been retained to assist in the liquidation process depending on the people you would need versus what employees were within the firm.

Q What people would you need?

A Probably you would need a few accounting people. Perhaps one operations type person to straighten out customer problems, maybe even two, customer account problems and clearing broker problems.

Q Would you go the next item?

A The next item is provision for liquidation expenses, and this represents the legal, accounting, staff settlement services and the cost of continuing the business and fully liquidating it subsequent to December 31, 1970.

And this is strictly my estimate based on my experience considering the size of the firm, the number of offices, the number of people involved, the complexity of the business and so on as to what it would cost to ultimately put the firm into complete liquidation.

Q And the next figure is a balancing figure, correct?

A The final figure is merely a balancing figure. I tallied up all my estimates and provisions and came to an odd number and I just -- to illustrate that -- it is an estimate or provision number and nothing, purely scientifically calculable that it was $1,460,000. That little number at the back end there balances it to 1,460,000 to round it off.

Q If there had been a liquidation on February 10, 1971 --

THE COURT: Do I understand that figure has no relationship to anything except you wanted to get to a $10,000 figure?

THE WITNESS: To a round number, that is correct. It is a very small number, it is really insignificant in terms of provisions, I think.

THE COURT: All right.

Why can't you deal with 1,458,200? You don't want to?

THE WITNESS: That would be to the nearest hundred. Since it was so close, I made the nearest 10,000, with a nominal adjustment.

THE COURT: All right.

Q What is your opinion as to what the effect of liquidation on February 10, 1971 would have been with respect to the liabilities of Newburger, Loeb?

A With respect to the liabilities?

Q Yes.

A Of Newburger, Loeb in total?

Q Yes.

A Well, the liquidation in February would have been underway. There would have been an attempt to settle liabilities. I am not sure I understand the question.

Q Well, Peat, Marwick's financial statement gives as liabilities $946,063 as of December 31, 1970.

In the event of liquidation, would the liabilities have increased?

A Well, yes. These adjustments that I just went through in detail would have increased the liability to 2,406,063 over the lifespan of the liquidation process.

Q That would have taken approximately how long?

A As a non-clearing firm, I would think that six to nine months should be a fairly reasonable good estimate of what it would take.

Q And does the figure $1,460,000 approximately represent a net loss sustained during that period?

A Yes, that is the liability adjustment loss.

Q Now, you had previously indicated that based upon your opinion and experience as a liquidator, it was your view that the assets would have been adjusted or would have gone downwards to $3,120,470 in the event of liquidation, correct?

A Yes, that is true.

Q And in the event of liquidation, there would be a further adjustment for liabilities sustained during the period during which there was liquidation, correct?

A That is correct.

Q What would have been left over at the end of liquidation?

A Well, those two items have an aggregate impact on the firm's capital structure, capital and subordinated liabilities structure of 2,038,686. The net result of that adjustment against that capital and subordinated liabilities section would have been to completely deplete the general and limited capital of the firm, which would be the general and limited partners' capital, and would have left only approximately $714,000 of subordinated capital.

Q Well, it would have left $714,407 of capital left, correct?

A That is correct.

Q Because there would have been an adjustment of the general partners and the limited partners' capital accounts to reflect the write-down of the assets and the liabilities sustained during the period of liquidation.

MR. MANDEL: I object to that as leading. It is really not in accordance with the testimony. He is now trying to get his --

MR. SHAW: Withdrawn.

Q What would the effect of liquidation have been upon the overall general partners' capital accounts?

MR. MANDEL: I object to that.

MR. SHAW: Withdrawn.

Q What would the effect of liquidation have been upon the capital of the firm?

A The capital of the firm would have been affected to the extent that general and limited partners' capital would be no longer there, be not existing, and the subordinated capital of the firm, which was on Peat, Marwick's statement $1,100,000, approximately, would have been reduced to approximately $714,000.

MR. SHAW: No further questions.

Oh, your Honor, I am sorry. I offer this exhibit in evidence, the schedule that the witness has been testifying from.

THE COURT: Yes, received.

MR. MANDEL: I have the objection I made earlier.

THE COURT: I will receive it.

(Plaintiff's Exhibit 129 was received in evidence)

THE COURT: We will take our recess.

(Recess.)

CROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Ragusin, I understood from the answers that you gave to Mr. Shaw that among the documents which you examined was a copy of the Peat, Marwick, Mitchell & Company statement of December 31, 1970, which is Finley, Kumble Exhibit I, correct?

A Yes.

Q Is that what is called a certified report?

A Yes, it is.

Q As a certified public accountant, I would ask if you would please look at page number 1 of that report and I invite your attention particularly to the language contained at the end of the third paragraph, which reads as follows:

"Also in our opinion subject to the matters discussed above, the supplementary data included in Schedule I (and Schedule I is the last page that sets forth the partners' net equity after distribution) presents fairly the information set forth therein."

Signed, Peat, Marwick, Mitchell & Company.

Now, Mr. Ragusin, as a certified public accountant, what does that mean, concerning whether any independent verification of the figures on Schedule I were made by the certifying accountants?

MR. MANDEL: I object to this, your Honor.

THE COURT: Yes, sustained. You had the man who made it, why didn't you ask him?

MR. GRUTMAN: I didn't read it then, Judge, and it is standard accounting practice.

THE COURT: I know.

MR. GRUTMAN: If I should have stopped the stitch at one point this morning, I do not think it should be something that is omitted from the Court's attention. Mr. Mandel seized upon the word "interpreted" and I believe in an attempt to confuse the Court to think that what Peat Marwick did was in some way to swallow something the firm gave to them.

Since this is a certified public accountant's report, and it purports to state fairly what is contained on Schedule I, I think this Court should understand from that, if it is generally accepted accounting practice --

THE COURT: I am going to sustain that objection. It speaks for itself, and the man was here. This man is not --

MR. GRUTMAN: Nobody asked him the question I did.

THE COURT: Well, sustained.

MR. GRUTMAN: I hope your Honor will read the exhibit.

I have no further questions.

THE COURT: You have read it to me.

MR. GRUTMAN: Very good.

THE COURT: Mr. Mandel? Anyone else?

MR. ESTERMAN: I have no questions.

CROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Ragusin, let us start with this:

You have entirely omitted from your calculations the fact that certain of the general partners owed the firm a million and a half, is that correct? Roughly? I am dealing with approximate figures.

A Omitted in my calculations? I do not know whether that part is literal. The figure that is on Peat, Marwick's statement, which is my starting point number, shows capital at one million, six hundred and fifty-two, and that is a net capital position among the general limited partners as a group.

Q Did you understand, based on your accounting knowledge, that as an accounting convention Peat, Marwick did not count as an asset of the firm in any way capital deficits which were in fact owed by some of the general partners?

MR. SHAW: If he stops after "were in fact owed," I have no objection to the question, your Honor. But combining those two things is two concepts.

THE COURT: Let us go at it a different way.

Mr. Ragusin, in doing this work-up, were you made aware of the fact that there were certain capital deficits of general partners?

THE WITNESS: Yes, I am aware of that.

THE COURT: Were you aware of the fact that those deficits amounted to, according to some testimony, as much as a million and a half dollars and that a million dollars came in?

THE WITNESS: Yes, I am aware of that.

THE COURT: Did you take that into consideration in any way in preparing this exhibit number, 126 in evidence, 129 in evidence?

THE WITNESS: I did take that into consideration. It is my opinion that those debit balances are not assets as you described them. I would question whether they are legally recoverable.

And secondly, whether they are practically recoverable, on a liquidation basis.

THE COURT: They in fact came in?

THE WITNESS: Not on a liquidation basis.

THE COURT: In other words, then, you did not treat them as a factor on the liquidation at all?

THE WITNESS: I considered them, and I put them at what value I thought they had, I left them alone, where they were, on a net basis.

Q You treated it as zero?

A I treated it as zero, correct.

Q And you discussed that question with Mr. Shaw?

A Among others.

Q You mean among other attorneys or among other questions?

A Well, obviously I had to gather a certain volume of material and details in order to do this job. In the course of gathering that material, I had discussions with a number of people, and this question was discussed with some or perhaps all of those people.

Q Did Mr. Shaw tell you to eliminate sums owed by partners in making your calculation?

A He did not tell me to do it, no.

Q Did he suggest it or agreed with it?

A Agreed with it, yes. Suggest it, no.

Q How about Mr. Grutman, did you discuss this matter with him?

A I believe he was in on the discussion we had concerning that topic, yes.

Q And he was in accord with eliminating this item as an asset?

A The discussion centered around whether legally these partners would be obliged to make these debit balances good.

Q Are you a lawyer?

A I am not.

MR. GRUTMAN: Can he finish his answer, please?

MR. MANDEL: He said he is not.

MR. GRUTMAN: That wasn't the question. He was in the middle of an answer when Mr. Mandel landed on him with another question. He was saying whether or not Mr. Grutman participated in the discussion.

MR. MANDEL: He said you did.

MR. GRUTMAN: That is not the whole of the answer. Could we have it read back?

THE COURT: All right.

(Record read.)

MR. GRUTMAN: He had not finished his answer.

THE COURT: Let us go forward.

THE WITNESS: I will finish the sentence:

And it was concluded that these obligations were not obligations on a liquidation basis.

Q Who made that conclusion?

MR. GRUTMAN: Let him finish.

THE COURT: He said it was not an obligation on a liquidation basis which is his answer.

MR. GRUTMAN: He appeared to be continuing before.

MR. MANDEL: I don't think so.

Q Were you finished?

A No. We did make references to the partnership agreement. As an attorney I listened, as a non-attorney, an accountant, I listened to the discussions. I listened to the references to the partnership agreement. I thought of my experience with Orvis Brothers where we had exactly the same situation. And I concluded that there was nothing to book here in terms of a receivable.

Q How about Mr. Risher, was he in on those conversations too?

A He was there, but whether he was in at that particular moment, I'm not sure. I believe he probably was. He was in and out.

Q Now, you were informed that in fact 900,000 some-odd dollars was collected from the partners.

A It was my understanding that this was concerned with tax recoveries of some kind and 900,000 or so did come into the firm subsequent on a continuing basis, yes.

Q And you were also informed, were you not, that an agreement was made for giving about $600,000 of the sums owed by the general partners?

A Yes, I was.

Q And were you also informed that in fact these general partners had tax refunds substantially in amounts in excess of the amounts they paid in?

A In excess of $900,000?

Q Yes.

A Yes, I believe the taxes, tax refunds were in excess of that.

Q So that if your legal conclusion is wrong, you could add a million and a half to the sums available for limited partners and subordinated lenders and other creditors of the firm, including withdrawn partners, right?

MR. SHAW: Objection.

THE COURT: Overruled.

A On the assumption that you could collect it in hard dollars, legally you may have a proposition if we are wrong in our conclusion, but then you have got to physically collect it. That may be quite difficult to do. My experience was that it was extremely difficult to do, and to my knowledge has not been done even to this day in Orvis Brothers, where the New York Stock Exchange advanced some $5,000,000.

And the partners had been sued jointly and severally for the full 5,000,000.

Q Now, getting back to this case, Mr. Ragusin, am I correct in saying that at no time did you participate in the self-liquidation of an ongoing brokerage firm?

A I was never responsible for a self-liquidation of an ongoing brokerage firm. I had some exposure to them because there were a few firms that were self-liquidating where I had some relationship problem and got involved to a minor extent.

Q All of your liquidations were situations in which the business was brought to a crashing halt on a day certain, is that correct?

A That would be a fair description, yes.

Q In making your estimates in the instant case, did you assume that that is what would have happened to Newburger, Loeb?

A I would have assumed that, and I did assume that the firm would have ceased doing business, revenues would have stopped coming in, there would have been an emphasis on limiting liability to the extent of getting rid of people and office facilities as quickly as possible, settling claims as quickly and cheaply as possible and realizing on assets as quickly as possible.

Q Now, you are aware, are you not, that many firms in Wall Street, when they liquidated, were able to sell off some of their offices, right?

A That's correct.

Q And when they sold off their offices, typically they would transfer their personnel to a buyer who would take over the lease, and the leasehold obligations, and pay them all or some of the value of the furniture and fixtures, right?

A I don't want to say yes to that because I can think of an instance where I had to pay somebody to take an office from us at Orvis, as an example. It depended on the facility.

THE COURT: Are you aware of the situations where firms have liquidated themselves by selling off branches to other brokerage houses?

THE WITNESS: The word "sale" was more of a give away than a sale.

Q They got rid of the leases, the leasehold obligations?

A That did happen. I won't deny that happened. It did happen in many cases.

Q And sometimes they got something for the furniture and fixtures?

A Depending on the quality of the office and the business it did and the value that was there, they may have gotten a few cents on the dollar.

Q Sometimes more than a few cents on a dollar?

A Sometimes more.

Q Because it is true, isn't it, that what the buyers wanted in many of these cases was the good will of the ongoing branch, right?

A They wanted an established business and established customers and that is what they were really after.

Q Right.

A That's correct.

Q If you were liquidating Newburger, Loeb as one of its partners, wouldn't you try to sell off some of its good offices?

A We have to assume every liquidator did that or everyone who was dissolving these firms attempted to do that.

Q In this case you assumed that that would not be done, in every case, right?

A I did make the assumption that the offices would be closed and the people would be severed, that's correct.

Q Right. And that none of the offices would be transferred with the good will and the personnel to a purchaser who would assume leasehold liabilities and pay at least something for the furniture and fixtures, right?

A You are right, except that my experience has been that more often than not that did not happen at that time.

In 1970, '71.

Q Were you informed that in fact this was in fact done with some of these Newburger, Loeb offices and the Newburger, Loeb name at a later date? Did anybody tell you that?

A I don't recall that being said.

Q Did you happen to know that the eighth floor of 5 Hanover Square, together with the Newburger, Loeb name and furniture and fixtures, so forth, were later part of a deal with W. E. Hutton?

MR. GRUTMAN: Your Honor, I am going to object to that. I believe that, I would like to believe that is just an innocent mistake, but I do not believe that that is the fact.

And the only basis on which these questions can be properly propounded is that if Mr. Mandel knows that to be a fact which he will prove and I am reliably informed that the foundation of that premise is false; they never took any leases, never took any leases which is the foundation of this whole argument that he is constructing out of pure sophistry and I object to it very strenuously.

MR. MANDEL: Your Honor, I am asking the question in good faith. If the witness doesn't know --

THE COURT: He apparently doesn't know anyway.

THE WITNESS: No.

MR. GRUTMAN: But the suggestion is being made to you, Judge, that Newburger, Loeb sold off its offices. That was the question.

THE COURT: If there was a suggestion made to me, it has been counteracted very forcefully so let us go forward.

MR. GRUTMAN: I hope not to interrupt.

MR. MANDEL: I am not accepting Mr. Grutman's statement. Your Honor should not be misled. As I understand it, the testimony here is --

THE COURT: As I told you when there was a jury here, I do not pay any attention to questions without answers, or comments of counsel which are not evidence.

MR. MANDEL: Fine.

THE COURT: Let us go forward.

MR. GRUTMAN: I hope not to interrupt, but I felt this was important enough to bring to the Court's notice that perhaps inadvertently Mr. Mandel had laid a whole foundation that has no factual application to Newburger, Loeb and I will put witnesses on to prove it if necessary.

THE COURT: Mr. Mandel says he is asking this question in good faith.

MR. MANDEL: That's right.

THE COURT: I will let him go forward on that basis. Go ahead.

Q Did you take into consideration, in connection with the various leasehold liabilities, that some of those leaseholds were partially sublet?

A There was reference to some subleasings, yes.

Q And did you take that into account in figuring the liability?

A I did.

Q Did you take into account that some of the leases were very good, profitable deals?

A What do you mean by "good, profitable deals"?

Q All right.

A Low rates?

Q Do you have a leasehold schedule available to you, do you have one in front of you now?

A Yes, I do.

Q Do you see the Century --

A Can I dig it out first, please?

Q All right.

A It may have been taken as the exhibit. Was it?

MR. SHAW: 123.

THE COURT: Go ahead.

Q Do you see the Century City lease at the bottom of the schedule of leaseholds?

A Yes.

Q And you see that the cost to expire is 1,355,902?

A Yes.

Q How much of a loss did you calculate in connection with that leasehold?

A I didn't do it individually. I did not do this by an individual build-up basis, I did it on an overall basis.

THE COURT: How did you do it?

THE WITNESS: I did it by considering a number of factors, an annual cost of 500 and some thousand dollars, a 3 million 2 overall cost at expiration. I looked at the life of the leases here, the one that counsel is referring to expires in a relatively short period of time, November of 1979. At that time, it would have been nine years. But from today of course it is less.

Q It is the longest of them all, isn't it?

A It is the longest of them all.

Q And it is the highest?

A Rental.

Q Total obligation?

A No question about it, because it is the longest.

But this is how I arrived at the number, by taking it on an overall basis, taking all these factors into consideration.

Q Did anybody tell you in connection with the Century City lease that it was partially sublet on a profitable basis and that it was a very good deal, and that in the end that leasehold was sold to W. E. Hutton and Bear, Stearns at a $60,000 profit?

A I was not told that, no.

Q No. When you figured annual cost and cost to expiration on the various leases, what number did you use, net of sublets or the gross figure?

A I used the gross figure because the schedule, this exhibit, does not have the numbers on the sublet.

Q So you did not give any credits whatsoever for sublet; you did not try to ascertain what those might be?

A There is only one that is indicated as totally sublet and it is a relatively small dollar amount. The others are partially sublet.

Q Yes, and partially sublet.

A It does not give the life of the sublease which may be less than the life of the lease commitment by the firm.

Q But you didn't look into those facts?

A I did not get into those factors.

Q Nobody told you and you didn't ask?

A Correct.

Q Did anybody tell you, Mr. Ragusin, that the 72nd Street leases and the 250 Park Avenue leases were taken over as Newburger, Loeb divisions at a later date by W.E. Hutton and Van Evans & Company?

A No.

MR. GRUTMAN: Your Honor, I object to the question, the word "take over," and I can represent that 250 Park Avenue is vacant space today, so that is why I am objecting.

MR. MANDEL: When did it become vacant, Mr. Grutman?

MR. GRUTMAN: Last November.

MR. MANDEL: All right.

Between 1971 and last November it was a Newburger, Loeb division, right, Mr. Grutman?

MR. GRUTMAN: Beg your pardon?

MR. MANDEL: Between 1971 and last November, that space was occupied as a Newburger, Loeb division, right? Right, okay?

MR. GRUTMAN: That's correct.

MR. MANDEL: My questions were asked in good faith. You will have an opportunity on cross examination.

MR. GRUTMAN: There is no take over of the lease.

Q Going now to the various securities, did anybody tell you about the value of the Geon warrants and the NCSS warrants held by the Newburger, Loeb firm?

A Yes.

Q And Crown Craft? What values did ascribe?

A The answer is no to the third one. Just the first two.

Q All right.

What values did you ascribe to the first two?

A I did not give them any value other than their nominal cost value that is contained in the Peat, Marwick figure.

Q Whether or not you were told that they had -- substantial market values or at least that the securities had substantial values as of December 31st.

A December 31, 1970?

Q Yes.

A In my opinion, they did not have substantial value at that point in time.

Q Why was that? Did you look at the market prices of the securities that the warrants referred to?

A I did, and also Peat, Marwick's report does not reflect any substantial --

Q Were you relying on Peat, Marwick's report?

A No, I was not. Those are two areas of reliance as a cross-check.

Q All right.

Now, what did your own research tell you about the value of the Geon warrants?

A I will attempt to dig out what I have on that.

(Pause.)

I have some prices. December 29, '70 I have a price of $14 a share as a bid price.

March '71, 17-1/2.

July '71, 3-1/2; and I believe that that price was the high for 1971.

Now, the way I valued this warrant, the price at which it is exercisable --

Q Is about 68,5?

A 66 to 68,4.

Q All right.

Let us take 68,5.

MR. SHAW: Let us not interrupt the witness, please.

MR. GRUTMAN: Let him finish.

THE COURT: Let him finish his statement, Mr. Mandel.

A The warrant has a problem because of limited transferability. I am talking about a liquidation situation, so I have to, in order to get value out of this thing, be in a position to transfer it.

Secondly, you do not get freely saleable stock when you exercise this warrant. So taking those two factors into consideration, and using a 50 percent plus discount on the quoted market price, for a stock which is not free stock, and the question of transferability, you come down with virtually no value to the warrant in the beginning of 1971 which is the time frame I am working within.

Q Well, did anybody tell you that within nine months the Geon warrants alone were exercised and sold for a profit of $260,000?

A Yes, I was told that later on in the year they were exercised and sold. I don't recall if that was the profit, but I know it was a significant dollar amount.

Q Now, if as you say they were not freely transferable immediately they would have been held in the liquidation for a while until they became transferable, right?

A Wrong.

Q What would have happened to them?

A Would have sold them most likely back to the company, where you did not have a transferability problem and would reasonably be anxious to get these things removed, particularly as the stock is running up, it probably would have paid some token amount, reasonable amount to you for it and in fact we got rid of a lot of the problems in just that manner.

Other situations we had to get rid of the warrants by selling them for a very, very nominal amount; junk value for all practical purposes and a lot of them were not worth much more than junk.

Q So despite everything which you were told about these warrants, you only gave them junk value, is that right?

A I really do not think I had any alternative considering the time framework I had to work in.

THE COURT: In your duties, you have liquidated three houses?

THE WITNESS: Yes.

THE COURT: Do you say that it is your practice as a liquidator, even though a liquidation may take as long as eighteen months, not to hold on to something that has no apparent val[illegible] see whether it does not acquire that value during say the course of a year? There is no compulsion on you to sell?

THE WITNESS: Your Honor, the difference is --

THE COURT: I am asking, is it your practice, given the kind of work you have done, to just get rid of something at the beginning?

THE WITNESS: There is a tendency to get rid of items as quickly as possible.

THE COURT: Even if it has no value?

THE WITNESS: Even if it has no value you end up getting a token amount for it just to get it out of the place.

THE COURT: What I am trying to ascertain is whether or not just a business practice in this field is not to hold on to something for the course of your period to see whether it does not acquire some value.

THE WITNESS: Absolutely true.

THE COURT: Wouldn't it make sense for you to see if it wouldn't acquire some value in the course of a period of time? Why get rid of it if it is worth nothing? Why not hang on to it for a year to see if it becomes valuable?

THE WITNESS: You are not there in a year.

THE COURT: You said it took eighteen months.

THE WITNESS: Those were clearing firms. This firm, I testified before, would take six to nine months because it is a non-clearing firm.

THE COURT: All right. How about nine months;

things worthless at the beginning, you can then throw it away at the end of nine months as still worthless.

THE WITNESS: The chances are during that time you would have attempted to get rid of it by contacting the company. They would have given you a few thousand dollars possibly for it and you would have made that deal rather than to play the market on an item of this type.

You do have a transferability problem here that is a very real problem.

THE COURT: I am just asking whether as a practical matter, and you do this for a livelihood, whether it is your practice to get rid of something of virtually no value whereas it might be better practice, given what you are doing here, to hang on to something to see if in the course of your dissolution it does not become valuable.

THE WITNESS: I do think you use a judgment. Obviously if you have got something that is running up on a continual cycle and it looks good and there is an inherent value in the underlying company, you try to --

THE COURT: You, as a liquidator, hang on to see if you can maximize the assets.

THE WITNESS: On the other hand, if you have a pile of this stuff, junk stuff, and you put it out for a bid and you put a block bid on it, somebody might give you something for it but it is obviously garbage; they just contain it in the vault of the firm.

In larger firms we have boxes of it. We had boxes in the Orvis. It is one hundred year old firm, too.

THE COURT: The little difference, then, might occur here as between a -- I have forgotten how it was described.

Mr. Mandel was talking about the difference between self-liquidating and a liquidation where a firm is brought to a crashing halt -- that was the language he used. A crashing halt situation; you might not have the desire or the foresight or the options to hang on to something whereas if it was self-liquidating, the people who were doing the liquidating might have more options to hang on to something.

THE WITNESS: I think you would tend to do that. I think you would be closer to the situation, the same people that ran the firm may be liquidating. Here you tend to use outsiders because the firm closes down and they bring in people whom the liquidator trusts and wants in there.

THE COURT: I see. Okay.

THE WITNESS: A different posture.

THE COURT: Thank you.

BY MR. MANDEL:

Q And even on the then-current values, on February

11th, the Geon that were exercisable had a profit in it of 60,000, right, just for the Geon?

A What price are you using on that? February 11th?

Q February 11th. In February the market price of Geon was a low of 17-1/4 and a high of 18-1/4. Is that right? Are you aware of that?

A I don't have that date. I have March; early March is still 17.

Q All right.

So that there would be an indicated profit of over $10 a share?

A No, hardly. You are getting letter stock.

Q What was the stock --

A You are getting letter stock.

Q When would it become free?

A I don't think Rule 144 was in effect at that time. That is about the time they put it in, which was the easy letter stock release rule that is in effect now. At that time it would have been a little bit more difficult. But you are talking in terms of pretty good time cycle.

Q When was Geon acquired, what is your assumption about that?

A It is my belief and understanding that the stock that is received when this warrant is exercised is letter stock, restricted stock, rather than freely marketable stock. That is number 1 problem.

Number 2, it is not transferable to anybody. Which is another problem.

Q Who told you that?

A Well, it is in the warrant. I have a copy of the warrant here.

Q Did you look at 3.2?

A Paragraph 3.2?

Q Right.

A I will look at it now.

(Pause.)

I don't remember. 03.2, yes.

Q Mr. Ragusin, let me ask you --

THE COURT: Let him look, Mr. Mandel.

MR. MANDEL: All right.

A Well, that is a section I used because I have it marked here myself.

Q That doesn't stop the time when the warrant may be exercised, does it? It has nothing to do with the time of exercise.

MR. SHAW: Is that 3.2?

MR. MANDEL: Yes.

Q 3.2 has nothing to do with the time when the warrant may be exercised.

A Has to do with transferability.

Q Yes, which is different from exercise.

A True.

Q Do you know the answer to that or not?

A I don't know what the question is.

THE COURT: At this point the question is whether transferability and exercise are separate things; yes or no.

THE WITNESS: Yes, sure. Of course.

Q And there is nothing restricting the exercise of those Geon warrants in February or March or April of 1971? Right or wrong or you don't know?

A They would have been exercisable at that date by someone liquidating the firm assuming we are in liquidation. What would he have gotten? He would have gotten letter stock.

Q What gives you that idea?

MR. GROSS: I hear this Greek chorus. I fear your Honor is hearing it, too.

THE COURT: Your vocal participation is not required here, Mr. Gross.

You say they would have gotten lettered stock?

THE WITNESS: That would not have been freely saleable at the time they got the stock.

Q When did it become freely --

MR. SHAW: Let us get an answer to that question. We seem to be in suspense whether it was letter stock or not.

A I looked at these two issues. One of these issues had the right of registration which would have been costly. The other one I believe had just plain letter stock, so I don't know which is which. I will have to read through it and find it. And it is a sizeable document.

Q Were you made aware that in fact --

MR. SHAW: I think the witness --

MR. MANDEL: I'm sorry.

Q Have you finished the last answer, Mr. Ragusin?

THE COURT: Are we at a resting point at this point?

THE WITNESS: Confusion point is always a good resting point.

THE COURT: Go ahead, Mr. Mandel.

A I don't know if we have an open question or not. I am looking through here as to the transferability. And the letter stock aspects of it. I think we are on the letter stock aspects of it now.

MR. MANDEL: What I would like to do, your Honor, to save time and I am anxious to do that, is the Geon warrant seems to be marked 126 for identification --

MR. SHAW: I gave it to Mr. Mandel this morning, your Honor. Offer it in evidence.

MR. MANDEL: May we just have that marked in evidence?

MR. SHAW: Fine.

(Plaintiff's Exhibit 126 was received in evidence.)

Q Were you aware, Mr. Ragusin, that within nine months these -- after the start of the year -- the Geon warrants alone were exercised and the stock was sold for a profit of $260,000?

A I knew that the warrants and/or stock was sold for a sizeable profit later on in the year. But I do not remember the exact dollar amount.

MR. MANDEL: I have nothing further.

REDIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Ragusin, is the amount of an individual general partners' capital account deficit an asset of the partnership according to customary accounting practices?

THE COURT: We have had this elsewhere and this is not really necessary.

MR. SHAW: All right.

Q You indicated that you did not take that as an asset in computing what would be left on liquidation, correct?

A That's correct, I did not.

Q Tell us the reasons why.

A Well, there are really two reasons.

One, I questioned whether legally I represented good accounting procedure because I don't know whether, on a liquidation basis particularly that is a recoverable asset, legally.

Q What do you mean by that?

A Pursuant to the partnership contract.

Q Well, are you referring to paragraph 9.4 of the partnership agreement?

A I don't remember the paragraph number, but --

MR. MANDEL: I object to that.

Q Let us go beyond that, give us another reason.

MR. MANDEL: This witness' interpretation of the partnership agreement is not really germane.

MR. SHAW: I am asking him to give us a further reason if there is.

A The second reason is the practical collectibility of an item of that type on a liquidation basis.

Q Have you had experience in this area trying to recover deficit capital sums from general partners where there is a liquidation?

A I did specifically and the other liquidators working for the New York Stock Exchange had similar problems on the ones they worked on, the partnership.

Q And based on this experience and what you know in this area, what is the basis for not including this as an asset on liquidation?

A They have difficulty in collecting them. In most cases they did not collect them.

Q Why?

A The question of offsets, the question of ability to pay on the part of the partners. When you have got a firm that is already liquidated there is no future hope or potential for the partner within that partnership so he tends to not want to pay it, even if he has the ability to pay.

Q He would have to be sued, correct?

A In my judgment he would certainly have to be sued.

THE COURT: Did you give consideration to the fact that if there was a tax refund there could be some sort of process levied against the tax refund in a suit?

THE WITNESS: We had exactly that in Orvis.

There were the tax refunds. The partners told us they had tax refunds but they never offered or tendered even though we demanded and we ended up suing and as I said, that suit has been in effect for about four years, and to my knoweldge there has been no collection whatsoever except from the auditing firm.

THE COURT: Did you ever make any attempt to attach the money?

THE WITNESS: You really have to ask the lawyers that. My opinion was that they were doing as good a job as they could to pursue whatever they could against these partners because we ended up suing them. We were certainly adversaries. We had not particular liking for them.

Q First you have to get a judgment against the deficit partner, wouldn't you?

A It is my understanding we would.

Q When you say the basis for your opinion is that you understood the firm or these firms came to a crashing halt, what do you mean by that?

A Well, using the word crashing halt is not literally true. There was no -- the New York Stock Exchange ordered firms out of business, which it did in most of the ones it liquidated under the Special Trust Fund of the Exchange back in that time framework, stopped them from doing any further business. They did permit, because of hardship reasons, customers to sell securities, because customers claimed firms weren't able to deliver the securities out to them rapidly, meanwhile the market was dropping. They were suffering losses, so they permitted sales, usually through a corresponding firm because they would terminate the floor partner in most, and everybody in the trading room, you wouldn't need a trading room anymore or sales group or registered reps.

Q So is it your view that how the firm terminates its business, in other words, on a day certain as a result of a decision by the New York Stock Exchange that is relevant with respect to what if anything it can realize on its assets and what effect its termination in business has upon its liability?

A Well, it does have an impact obviously. If you have more time to work at these things, the chances are you will do a little better in terms of recovery. You do have an awful lot of customer problems. This particular --

THE COURT: There is no question pending before you sir at this point.

MR. SHAW: No further questions.

RECROSS EXAMINATION

BY MR. GRUTMAN:

Q Mr. Ragusin, his Honor was asking you some questions about the policy of a liquidator in deferring the disposition of securities that were worthless until the end of the liquidation period.

Do you recall those questions?

A Yes, I do.

Q In any liquidation, whether of a clearing house or a non-clearing house, is it the purpose of the liquidator to wind up the affairs of the business as quickly as possible?

A That is the objective.

Q And is it part of the business of the liquidator to speculate with securities?

A Absolutely not.

THE COURT: Well no, Mr. Grutman, now look, I explored this quite fully with him, and he did not say "speculate" at all. I asked him whether if he had something that wasn't worth anything at the beginning, whether it did not make sense to hang on to it a little bit to see if it became something. I do not regard that as speculating.

If you have got something that is worth nothing, it can only go up and also he did say --

MR. GRUTMAN: That is also the point I am coming to.

Q If you have something that is worth nothing and it has a modest rise, do you have any assurance that the rise will continue or that it may go back down to zero, or what will happen to it?

A You do not, that is one of the reasons you tend to do things in an orderly, controlled systematic fashion, so you are not accused of playing games with the market.

Q In the event that you did that you might be?

A You might be criticized later, and you could well be .

MR. GRUTMAN: No further questions.

RECROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Ragusin, am I right that in answering Mr. Shaw's question about what the Stock Exchange does, you were talking about clearing houses which have customers, right?

A The ones I did all had customers, yes.

Q And you are aware, are you not, that on December 31st of 1970 and February 11th of 1971, Newburger, Loeb cleared through W. E. Hutton and did not carry any customers on its books, right?

A Yes, and that is why I estimated a shorter time span for the liquidation.

Q But that also has something to do with the New

York Stock Exchange action, doesn't it? You were talking about what the New York Stock Exchange would do in a specific situation with a firm that had customers on its books [illegible] the Exchange had to protect, right?

A Well, they were two separate entities -- are separate entities. I do not follow your question literally.

Q Your answer to Mr. Shaw about what the New York Stock Exchange would do referred to the fact that the Exchange had to protect the customer, the customers' accounts and you explained what they would do about halting the business for that purpose, am I right?

A Oh, yes, right.

Q That explanation is not applicable to a firm which is non-clearing, am I right about that?

A That's right. It would be a different set of circumstances, that is correct.

Q Right. Now, in the non-clearing situation, the New York Stock Exchange does not have to protect customers of the firm, is that correct?

A It is normally true, yes.

Q And what the New York Stock Exchange would do in such a case, or do you have experience at all as to what the Exchange does in those cases?

A I did not handle any, but I know another liquidator that did, I think Axelrod was in those circumstances.

Q Let me put it to you this way:

In making your estimates, did you assume that the New York Stock Exchange would not permit an orderly self-liquidation of Newburger, Loeb?

A I think they would look for an orderly liquidation on a self-liquidation basis; that's correct.

Q All right.

Now, my question is, in making your estimates you did not assume an orderly self-liquidation, did you?

A Yes, I did. I did.

Q You did?

A As an alternative, what is the other assumption I could have made?

Q That an outside liquidator would be called in like yourself.

A Well, if the firm went into liquidation, and in self-liquidation, a small nucleus, usually the pre-existing people stay there, because there is no customer accounts to protect, there is no securities to handle. It would still only be a small nucleus of people and probably be somebody internally that the exchange would accept to wind down the business.

Q And that would cut down the cost of liquidation, right?

A Yes, certainly would.

Q Beyond what you estimated.

MR. GRUTMAN: He didn't say that.

A Just would cut it down. I considered all that. I considered a short orderly controlled liquidation of Newburger, Loeb that could be completed within six to nine months. In the beginning it would be more active and would trail off in terms of activity,towards the end there might be one or two people left, and primarily lease problems rather than any customer-related research or anything of that type.

You have to recognize that, I think Newburger did clear for itself for a while and undoubtedly there were many customer problems hanging over in prior years.

Q Do you know that?

A I would assume. I did not know this for a fact. I am assuming that.

Q Didn't you look at the Peat, Marwick statement? Wouldn't that take care of customer liabilities?

A I am thinking of it in terms of workload, rather than dollar amount liability, strictly workload. There is an amazing amount of work on these liquidations that people are unaware of, like the IRS coming in asking questions about customers from five years ago that you have got to comply with. SEC on trading of stock, so on, so forth. Takes up staff time and costs you money, but you have to do it.

Q I would like to call your attention to Exhibit 128 for identification, which is your notes, right?

A These are my numbers off to the extreme right.

Q All right.

And am I right that among the expenses which you considered and charged the firm with was an item of $75,000 for Jeanne Donoghue?

A No. It is already provided. That is why I have it logged out. It is already provided on the balance sheet. This column is mone, which is a zero. This 75 is already provided.

Q Where was it provided on the balance sheet?

A It is on the limited partner Schedule I, it is her $75,000 limited partner interest.

MR. SHAW: Exhibit I.

A That is why I ignored those items.

Q But the schedule of litigations which you used or claims --

MR. GRUTMAN: Your Honor, this is not proper recross.

MR. SHAW: Let him do it.

Q I will ask you one further question about the number you reached for the litigations.

Did anybody -- did you examine the litigation folders?

A No, I did not.

Q Did you use any kind of a percentage basis for reaching the number?

A No, I did not.

Q Did you get a number by discussion with somebody?

A I arrived at my number after discussions, case by case, but I was unable to examine files, I did not have the time. I was unable to verify underlying documentation. I had to accept the facts that were presented to me and I did so.

Q Who made the representations to you that you relied upon?

A Primarily Paul Risher.

Q So that insofar as the litigations are concerned, the accuracy of your estimate depends on the accuracy of information to you by Mr. Risher; no more, no less?

A It is based on that so obviously that follows.

MR. MANDEL: Nothing further.

Oh, excuse me.

Q You have an item for severance pay.

A $81,000.

Q And vacation pay?

A Yes.

Q Now, what information did you have about number and nature of the employees on February 11, 1971?

A Well, December '70 was the year. I had payroll dollars, broker and non-broker. And for the brokers I used $10,000 a week. This is exclusive of commission. This is fixed compensation. And I used that for the number rather than any other --

Q Where did you get the information that the brokers got anything besides commission?

A From Mr. Risher. He provided me with this data.

Q How many non-broker employees were there on December 31st?

A I'm not sure of the number. I had 75,000 as the monthly salary for the non-broker monthly salary dollar amount, $75,000.

Q Does that include partners?

A I would think it would include non-productive type partners, additive type partners on their draw.

Q Now, sir --

A But I did not look into it enough to answer that definitively.

Q You did not look into that.

Now, as of February 11th, did anybody tell you as of February 11th there were only five back office employees?

A They did not. I wouldn't have asked on February 11th. I was concerned --

Q So that all of your testimony is as to what would have happened if there had been a liquidation?

MR. GRUTMAN: I must rise again, your Honor.

It is not five. There are 150 employees of Newburger, Loeb on February 11th. Did you know that, Mr. Mandel, when you suggested to the witness five?

THE COURT: Please, Mr. Grutman, address the comments to me.

MR. GRUTMAN: Your Honor, Mr. Mandel has suggested to the Court there were only five employees.

THE COURT: Back office employees he said.

MR. GRUTMAN: That's wrong too. That is wrong.

MR. MANDEL: If it is wrong, you can have testimony.

THE COURT: In any event, he doesn't know.

Q And all of your information is based on the assumption of a December 31st liquidation, which you know never took place.

A Commencement, theoretically commencing at December 31, 1970, that is correct.

MR. MANDEL: Nothing further.

THE COURT: Anything further?

All right, you may step down, sir. Thank you very much.

(Witness excused.)

THE COURT: Mr. Shaw, we are going to quit in about ten minutes.

MR. SHAW: May I have two minutes, talking to Mr. Risher, to clear up one point? Can you just wait a moment, Mr. Ragusin?

THE COURT: All right.

(Pause.)

MR. SHAW: We have no further questions, your Honor.

THE COURT: Very good.

MR. SHAW: There are a few additional details.

I have received by messenger an envelope from Peat, Marwick, Mitchell signed by Mr. Alvey containing various--what appear to be print-outs from microfilm which I would like to have --

THE COURT: Why don't you show those to Mr. Mandel

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and let him look at them overnight so we have no great rush onthem, and he can respond in the morning.

MR. SHAW: Can we mark them 127A for identification?

THE COURT: Sure.

MR. MANDEL: What is 12

THE COURT: That is the sheets of paper that Mr. Alvey sent down by messenger.

(Plaintiff's Exhibit 127A was marked for identification.)

MR. MANDEL: Is it all right for Mr. Ragusin to leave?

THE COURT: Yes.

MR. GRUTMAN: I have no further questions,

Your Honor, appropos of the witness for tomorrow, Mr. Shaw --

THE COURT: Has Mr. Shaw got anything more now tha he wants to present?

MR. SHAW: I believe that there will be --

MR. GRUTMAN: Your Honor, I had expected that the development of proof today would have moved along more swiftly and that I would not have been confronted with the problem which I presently have.

THE COURT: I thought we moved along rather

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slowly. Mr. Shaw said he would be through --

MR. SHAW: I do not believe there are any further witnesses or any further depositions I can read in evidence.

THE COURT: You are finished?

MR. SHAW: I believe I am. I believe I would like to look over certain exhibits to make sure all the exhibits are in evidence. I do not believe there will be any further testimony from live witnesses or any further depositions. But I would like not to formally rest until tomorrow morning.

MR. MANDEL: In the interest of justice may I say something to Mr. Shaw?

Mr. Shaw, you have not put in evidence which you have on mitigation of damages with regard to the Rafkind claim. We gave you in answers to interrogatories what Mr. Gross' actual income was during certain periods.

Now, I think you would probably want to put that in. If not, we will put it in ourselves.

MR. SHAW: It is my view, your Honor, that the burden of proof is upon Mr. Mandel to establish how he has been damaged, not upon us. I also do not believe that the proof has risen to that issue.

THE COURT: All right, you govern yourself accordingly. Very good.

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MR. GRUTMAN: Your Honor, I would like to --

THE COURT: So subject then to something that you think about overnight, but that you are not presently aware of, you are through?

MR. SHAW: Yes, your Honor.

THE COURT: All right.

MR. GRUTMAN: I would have expected, your Honor, earlier in the day, to have had Mr. Shaw complete his witnesses and to have called another witness who had been here but who is not now, and I would like to call that witness tomorrow morning, and I have issued a subpoena for Mable Bleich, who is not here this afternoon, and I would like her here tomorrow morning at 10 o'clock.

Can that be arranged, Mr. Mandel?

THE COURT: You will have to issue a subpoena or --

MR. GRUTMAN: She is a party to the lawsuit; she has been here every day for seven weeks, just by inadvertence she is not here this afternoon. I would like to have her here tomorrow.

THE COURT: Mr. Mandel, will you arrange to have her here tomorrow?

MR. MANDEL: If the Court would like me to do that, I will. I would rather shorten the trial if I can, but if the Court directs it --

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THE COURT: I think it appropriate, if she is requested to appear. A subpoena could be served, but let us save that.

MR. MADNEL: It is a last minute surprise, but we will responde. We will have her here.

THE COURT: Very good.

MR. GRUTMAN: I expect to finish our proof by noontime tomorrow, so that Mr. Mandel, in the interest of moving along without gaps, should be ready with his rebuttal proof.

MR. SHAW: Mr. Mandel was given a certain schedule with respect to the capital accounts of certain withdrawn general partners including Mr. Roggenburg.

Have you decided whether you stipulate with respect to that?

MR. MANDEL: Yes, we will stipulate.

MR. SHAW: May I read that into the record then?

Louis Bracker --

MR. MANDEL: We think it is already in the record but read it in.

MR. SHAW: -- who withdrew on July 30, 1970, had a positive capital account of $6,940. Adolphus Roggenburg--December 25, 1970 is the date of his withdrawal, and his positive capital account was $147,681.

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MR. GRUTMAN: As I was saying, your Honor, I expect to be through by the luncheon recess tomorrow, if we begin at 10 o'clock. I might even finish before the luncheon recess.

MR. MANDEL: Who are your witnesses besides Mrs. Bleich, so I can prepare cross examination?

MR. GRUTMAN: The Richenthal firm.

MR. MANDEL: You have a problem about that because Mr. Moss has been here trying the case all along. You now propose to bring a partner of that firm as a witness?

MR. GRUTMAN: I have been a party all along --

MR. MANDEL: YOur partners are in a pro se position. Mr. Richenthal is not in a pro se position.

With regard to Mr. Richenthal, it is a case where the firm which has tried the case is now brining a partner as a witness in violation of the canons of ethics.

MR. GRUTMAN: The canons are directed only to the lawyer who tries the case, not to a member of the firm.

MR. MANDEL: That's wrong. That is the lawyer or his partners.

MR. SHAW: I don't think the canons of ethics would bar either lawyer from calling a lawyer who may be a witness, and who is representing someone, as a witness in the case.

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THE COURT: I will have a look at the canons overnight, and if they cause problems, they will cause problems. Very good.

MR. MANDEL: Any other witnesses?

MR. GRUTMAN: No.

Who are you going to put on, Mr. Mandel?

MR. MANDEL: Gross, Dilger and Settel.

MR. GRUTMAN: Good.

THE COURT: We will stand in recess until 10 in the morning.

MR. GRUTMAN: There have been a number of motions which have been before you. Some were made before the commencement of trial. Will we get a chance to deal with those motions and some other motions when the proof closes?

THE COURT: I will talk to you about that on Friday.

(Adjourned to July 31, 1976 at 10 a.m.)

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NEWBURGER LOEB & COMPANY, INC., as
assignee of claims of David Buckley
and Mary Buckley,

Plaintiffs,

- vs -

71 Civ. 685

CHARLES GROSS, MABEL BLEICH and
GROSS & COMPANY,

Defendants

- and -

NEWBURGER LOEB & COMPANY, a New York
Limited Partnership, ANDREW M. NEWBURGER,
ROBERT L. NEWBURGER, LEO STERN, ROBERT L.
STERN, RICHARD D. STERN, JOHN F. SETTEL,
HAROLD J. RICHARDS, SANFORD ROGGENBURG,
ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX
AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER,
CHARLES SLOANE, ROBERT S. PERSKY, FINLEY,
KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership
and LAWRENCE J. BERKOWITZ,

Additional Defendants on
Counterclaims.

July 31, 1975

MR. GRUTMAN: Your Honor, I propose to call one of those witnesses who is a lawyer, your Honor, and we arranged for his appearance this morning. He is Mr. Abrams.

MR. SHAW: Your Honor, Miss Bleich is going to testify. Portions of her testimony will relate to the plaintiffs' case. In addition to that, we have some interrogatories to read, some various documents. They could be lengthy, like an hour or two.

MR. GRUTMAN: Mr. Abrams, please take the stand.

MR. MANDEL: With regard to Mr. Abrams, we have the matter I discussed yesterday. Mr. Abrams is a partner of Mr. Moss.

THE COURT: Mr. Mandel, I read the section on what I believe is applicable here, which is if after undertaking employment and contemplated and pending litigation a lawyer learns, or it is obvious he or another lawyer in his firm, may be called as a witness other than on behalf of his client -- I take it that's the purpose of this appearance on the stand -- he may continue the representation until it is apparent that his testimony is, or may be, prejudicial to his client.

Do you know of anything to the contrary?

MR. MANDEL: In other words, the position here is that Mr. Abrams is not testifying for his clients but for other people.

THE COURT: That's what I gather. If it is not on that basis, then he comes under the rule that he may not testify without disqualifying himself and his firm.

Mr. Abrams, have you consulted with those who are putting you on the stand? Do you know what they are going to ask you?

MR. ABRAMS: In general, yes.

THE COURT: Does it touch upon the interest of your clients in any way?

MR. ABRAMS: I don't believe so, your Honor. I don't believe so.

MR. GRUTMAN: May I proceed?

THE COURT: Just a minute.

MR. ABRAMS: I don't believe so.

As I understand it, I am going to be asked about a meeting, one or more meetings, that I attended, and what was said.

MR. GRUTMAN: That's it.

THE COURT: You have heard me read --

MR. ABRAMS: I'm generally familiar with that.

THE COURT: You have heard me read the provision applicable , as I understand it, applicable to your appearance, and if there is anything you are going to testify to that may be prejudicial to your client, then we have an entirely different matter.

On that basis you may proceed.

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pgsr

NEUBURGER, LOEB & COMPANY, INC ., as assignee of claims of David Buckley and Mary Buckley,

Plaintiffs,

- v s -

CHARLES GROSS, MABEL BLEICH and GROSS & COMPANY,

71 Civ. 685

Defendants

- and -

NEUBURGER, LOEB & COMPANY, a New York Limited Partnership, ANDREW M. NEUBURGER, ROBERT L. NEUBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

July 31, 1975

[Partial]

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DAVID ABRAMS, called as a witness on behalf of defendant Finley, Kumble et cetera, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Abrams, are you an attorney duly licensed to practice law in the State of New York?

A Yes.

Q From what law school were you graduated?

A Harvard Law School.

Q While at Harvard Law School were you a member of the Harvard Law Review?

A Yes, I was.

Q Were you an officer of the Review?

A Yes, sir, I was.

Q What post or position did you occupy while at Harvard Law School?

A I was notes editor, one of the two notes editors.

Q What year did you graduate?

A 1953.

Q What is the general outline of your professional career and activities, if you would set them forth for us, please.

A I went into the Service after graduating from Harvard Law School, and while in the Service I took my Bar examination and was admitted to the Bar in 1954 when I was honorably discharged from the Service.

In 1955 I then, after seeking employment with various firms, I became at that time, in August of 1955, associated with the firm then known as Arthur Richenthal, with whom I have been associated, and I have been a partner since the 1960's.

Q Are you a member of any Bar associations or professional legal groups or associations?

A The New York State Bar Association.

Q Have you been continuously engaged in the private practice of law since joining that firm in 1955?

A Yes, full time.

Q Sometime in the year 1970 and while you were a partner of your present law firm, did you have occasion to render professional legal services on behalf of a client in your firm connected with the reorganization of the brokerage house called Neuburger, Loeb & Company?

A Yes.

Q Do you recollect in what year it was that you first became associated with that matter?

A Near the end of 1970.

Q Did your representation, that is to say your own personal participation in the representation, continue on into the early months of 1971?

A Yes.

Q Do you recall what client it was that your law firm represented?

A Mr. Kuarte, who is a limited partner in Neuburger, Loeb & Company, and then our representation -- rather, Mr. Richental for the firm, for our firm, was one of the three members of a committee representing all the limited partners.

Q Aside from Mr. Richenthal, did that committee include Mr. Steefel of Stroock, Stroock & Levan and a lawyer named Eisenberg?

A Yes.

Q Do you recollect the name of the client whom Mr. Eisenberg represented?

A No, I do not.

Q On February 5, 1971, did you have occasion on behalf of your firm's client to attend a meeting of various groups that were involved in the proposed reorganization of Neuburger, Loeb?

A Yes, I did.

Q Do you recall where the meeting was held?

A My recollection was that it was at Golenbock &

Barell's office.

Q Do you recollect what the problem was which was being discussed at the February 5 meeting?

A The problem was whether the interests of the various other groups could be reconciled with the interests of Charles Gross and Mable Bleich and Jean Donohue.

Q What was the position of Charles Gross, Mable Bleich and Jean Donohue, as you recall it? What did they want?

A Basically, at that meeting, they wanted cash, basically cash; although there was mention of the fact that Charles Gross needed at least $100,000 in cash, they would be possibly be willing to take paper in a new corporation, the same as the limited partners were getting, but they wanted some more security that that paper would be actually realized upon. That's my recollection.

Q Mr. Abrams, the time Mr. Gross was asking for this particular series of items, do you recollect what his status was in Neuburger, Loeb & Company?

A Yes. I understand that he was a withdrawn general partner. He had given notice of withdrawing.

Q You say he wanted paper like the paper that was being given to limited partners?

A He wanted cash. He wanted a certain amount of cash. That was expressed by Mr. Mandel and/or Mr. Gross. I think Mr. Mandel was doing most of the talking for Mr. Gross.

Q But the kind of paper which he said he said he was willing to accept, was that the same kind of paper that was being given to other withdrawn general partners and still extant general partners?

A The tentative proposal that might be possibly acceptable, as Mr. Mandel explained it, limited partner paper but with some additional type of security.

Q Was the limited partner kind of paper that Mr. Mandel was requesting on Gross' behalf the same kind of paper that was being given to other withdrawn general partners and general partners?

MR. MANDEL: I believe this is irrelevant.

THE COURT: Sustained.

Q What was the position of the other people at the meeting in response to these demands made by Gross, Bleich and Donohue?

MR. MANDEL: I object to that question because it is too broad.

THE COURT: If you will give us speakers, Mr. Abrams, that will cure the objection.

MR. GRUTMAN: Right.

A Well, Mr. Steefel at that meeting, my recollection is, did most of the talking, representing the groups on the opposite side of the Charles Gross position. Basically, in essence, the position was that Charles Gross wanted to be better off than the general partners and, in fact, why should he be as well off as the limited partners? There is no reason for it because the limited partners, Mr. Steefel said, believed that Charles Gross had committed certain wrongs or misdeeds and was responsible for the position which the limited partners found themselves in.

Q Were the limited partners willing to accede to the demands made by Gross for cash?

A No.

Q Do you recollect what they said about that?

A At that meeting?

Q Yes, sir.

A Mr. Steefel and I were representing the limited partners at that meeting and, basically, Mr. Steefel did most of the talking for us, although I said a few things joining in with him. Basically, that there would be no cash paid out.

Q Was that a position taken by you in consultation with Finley, Kumble, or was that just your position?

A No. That was the position of the limited partners.

Q And the assertion of the claims of wrongdoing that was alleged against Mr. Gross, who was it who alleged the acts of wrongdoing against Mr. Gross at that meeting?

THE COURT: That's your characterization.

What was alleged, Mr. Abrams?

THE WITNESS: There was a discussion. A discussion came up during the meeting of claims by Mr. Gross, possibly against the general partners, and by the general partners and limited partners against Mr. Gross.

Q Who asserted those claims?

THE COURT: Wait a minute.

What was said?

THE WITNESS: Mr. Steefel joined in, in part by Ned Frank, and at that meeting stated that the limited partners felt there were various claims they had against Charles Gross for his -- during the course of his management of the partnership, such as improper trading of partnership monies, the loss that the partnership suffered having to do with the Buckley claim, and the loss they had suffered on the Westec stock; that Charles Gross had made an improper investment, put them into a basketball team -- the Buffalo Braves at that time -- and the lease that Charles Gross had allegedly entered into, a huge lease, for millions of dollars, and had been offered an opportunity for the partnership to get off the lease and this, I think, Frank said in part, that he had been told that the partnership would be paid a sum of money, $100,000, $150,000 if it would get out of the lease, but Charles Gross had turned it down and now the partnership is stuck with the huge payment.

MR. MANDEL: May we have the usual ruling that this hearsay is not admitted --

THE COURT: Just for the fact that Ned Frank said it at the meeting, according to this testimony.

Q Mr. Abrams, I am going to read to you from a document which has been received in evidence and marked Defendants' Exhibit FFF. I refer specifically to certain contents of that document on Page 3 thereof which reads as follows -- and these were notes that were taken by a lawyer named Arthur Silverman of the Golenbock & Barell firm of what transpired at the meeting you just testified about.

THE COURT: Is this to refresh his recollection?

MR. GRUTMAN: Yes.

THE COURT: Has he shown he has no recollection?

MR. GRUTMAN: It is a foundation question, your Honor.

THE COURT: I don't understand that it is appropriate to read to him somebody else's recollection of the meeting without exhausting his as a foundation.

MR. GRUTMAN: The purpose of it, your Honor, is to establish, if I can, who it was who said certain things that had been testified to here by other witnesses.

THE COURT: Ask him and see what he says.

MR. GRUTMAN: In order to do that I must read from the exhibit. It is a very brief excerpt.

THE COURT: I will not permit that.

BY MR. GRUTMAN:

Q Do you recollect whether or not these claims you just testified to about, namely the use of partnership funds without authorization for trading, the Buckley claim, and investment of partnership funds and the assumption of debt to go into the basketball team, and the claim concerning the lease, who made the statement concerning those claims?

A Mr. Steefel, and, in part, on the lease, I think Ned Frank was the one who said that he had spoken with somebody from the landlord and understood that Neuburger, Loeb could have gotten out of that lease with a payment.

Q Do you recollect whether or not Mr. Persky made any of those claims?

A My recollection is he did not.

Q Do you remember any statements made by Mr. Persky concerning litigation at that meeting?

A My recollection is that Mr. Persky at that meeting that I attended was making statements to the extent he said anything of a pacifying nature.

Q Do you recollect whether or not, as appears on Page 7 --

THE COURT: Let's explore this.

What do you mean by "a pacifying nature"?

THE WITNESS: I remember Persky saying, "We don't want litigation with anybody. Let's see if we can make a deal."

At that meeting, as I recollect it, Mr. Persky was trying to see if an accomodation could be reached with Mr. Gross.

Q Did Mr. Persky shout or scream or what?

A I have no recollection of him shouting or screaming.

Q Do you have a recollection of him raising his voice at all?

A No. My recollection is that Persky didn't say that much at that meeting. My recollection is that, frankly, most of the talking at that meeting was done by Mr. Mandel and Mr. Steefel.

Q Do you recollect Mr. Persky stating as appears in Exhibit FFF, Page 7 in evidence: The corporation wants no litigation. Everybody should release one another?

Do you remember Mr. Persky stating that?

A In substance. I don't remember the particular words.

Q Do you recollect the tone of whatever Mr. Persky said, whether it was menacing or threatening?

A I don't remember Mr. Persky at that meeting being menacing or threatening. My recollection of the demeanor of Mr. Persky at that meeting was to try to pacify everybody and see if a deal could be made.

Q Do you recollect that the meeting ended without a composition of differences between Gross and all the other people?

A That's right. There was no agreement.

Q Do you remember what Mr. Steefel said when the meeting terminated?

A Well, Mr. Steefel's position, as he expressed it, when the meeting terminated, was that Gross wanted too much -- in words or substance that he wanted to be treated better than he should be, and he is just grasping, going overboard, he is pushing too hard.

Q Do you remember him saying that Charles Gross is being a pig?

A I don't remember specifically those specific words. I remember statements by Mr. Steefel that he was -- he wanted too much.

Q During the course of the meeting, do you remember Mr. Mandel stating that Bleich and Donohue were balking at going along with the proposed transfer agreement?

A Yes. My recollection is that in substance they would not go along unless Charles Gross was satisfied.

Q Do you likewise recall whether any statement was made by Mr. Mandel indicating that if Charles Gross could be satisfied he could get Bleich and Donohue to go along with the deal?

A Yes. In substance. Mr. Mandel -- the impression given by Mr. Mandel's statement was that that was so, that if Charlie Gross was satisfied we could assume that Mable Bleich and Donohue would go along.

Q Did he say why?

A I don't recall that except I knew from statements made prior to or at that meeting beforehand that Donohue was a sister and Mable Bleich was either a long-time employee or associate, so I frankly took it as a fact that if Charles Gross wanted them to do something presumably they would do it.

Q Subsequent to February 5 do you recollect attending a meeting on February 8th?

A There was another meeting before the closing.

Q Had there been any shift in positions between February 5 and February 8?

THE COURT: This is the next meeting?

MR. GRUTMAN: Yes.

THE COURT: He doesn't recall it as being February 8th, I take it.

Q The next meeting of which we have been told took place on February 8th and a document marked Defendants' Exhibit GGG indicates that you were present.

A There was another meeting before the closing that I attended, yes, a few days later.

MR. ROTHMAN: Exhibit GGG is not a correct designation.

THE COURT: Ask him about this later meeting.

Q Was there any shift in position at that meeting?

A Not generally. Charles Gross still wanted a certain amount of money. The way the money would possibly come to him would be to pay off either Donohue or Bleich -- I forget which -- pay off one of them, some additional money, and then he wanted a partnership, limited partnership type paper, but with some kind of better security that would be realizable. My recollection is that there was no basic shift in positions.

Q You say that the money would come to Gross by paying off either Bleich or Donohue?

A Yes.

Q What was said how the money would come to Gross and Bleich or Donohue if both were paid?

A The proposition made by Mr. Mandel was that Charles Gross needed at least $100,000 in cash, and Mr. Mandel threw out on the table the fact that if one of the limited partners, either Mable Bleich or Jean Donohue was paid $75,000 down rather than having to wait six months or five months still to go, and Charles Gross got another $25,000 somehow from the partnership, the partners, or somebody buying back part of limited partnership paper from him, that would give him at least $100,000 in cash which he needed, and the rest he would take in limited partnership paper, but one of the problems was also what was the amount of his alleged capital account.

Q Was it said on behalf of Mr. Gross that the money that would be ostensibly paid to either Donohue --

THE COURT: No, no. This is leading.

Q Did he say why?

THE COURT: You are assuming what he is saying.

A The reason is Charlie Gross needed the money to go into business.

Q As a what?

A I believe trading -- securities business.

Q And the sum that was mentioned was the $100,000?

A He had to have $100,000. I think that was the minimum.

Q Was the $100,000 that Gross said he wanted to go into business as a trader, did that include the $75,000 that was earmarked for Bleich or Donohue?

A Yes. That was my understanding.

Q I would like to invite your attention to the closing itself on February 11th. Did you attend that closing?

A Yes.

Q Prior to the closing had you seen the working agreement of December 31st which had been executed at that time?

A Yes.

Q Did you know whether or not by the provisions of the December 31st agreement it was contemplated that the Rosenman firm, as part of the closing, would deliver a certain opinion letter?

A Yes.

Q Were you present when the lawyer from the

Rosenman firm who was present at the February 11th closing announced that that opinion letter would not be forthcoming from the Rosenman firm?

A Yes. Mr. Burak said he would or could not issue the opinion.

Q When he made that announcement what happened in the room?

A There was some caucusing. There were a lot of lawyers there.

Q What was the attitude of the people present when the announcement was made by Burak?

A Generally there was some surprise. The expression of surprise, and then there was caucusing by the lawyers, different groups, and I recall there was some discussion of -- well -- why is an opinion needed if the corporation will waive it?

I don't remember who said it, but it was a general consensus by all the lawyers there, and there were many, maybe fifteen or twenty. Everybody would feel more comfortable with an opinion, even though the corporation if it wanted to could waive it.

There was then said, well, in substance, you know, canvassing around, who is familiar with the partnership law and the background and so forth, who could give such opinion?

Mr. Persky said he had gone into the background of it on behalf of the corporation, and if nobody else felt they could give such an opinion, he believed, based upon his background, research, et cetera, that he could give such an opinion if there was no objection. There was a discussion that while he was representing the corporation, Mr. Persky and his firm, it was agreed if everybody consented he could act for the partnership.

Q Did everybody consent?

A Oh, yes.

Q Did Mr. Persky then withdraw to prepare the opinion letter?

A Yes.

Q How long after that did Persky reappear with the proposed draft of the opinion letter?

A I would say 35 to 45 to 50 minutes.

Q Was the opinion letter circularized?

A Yes.

Q Was it accepted?

A Yes, it was.

Q Do you recall whether anybody objected to the opinion letter which Mr. Persky produced about 45 to 50 minutes after he was asked to prepare it?

A No one voiced an objection in my presence.

Q Did everyone present sign?

A Yes.

Q Do you have a recollection of being in Mr. Persky's presence when Mr. Burak made the announcement that the Rosenman firm would not deliver the opinion?

A Well, I was there. I don't know if he made the statement before, but I was there when he made the statement and Mr. Persky was there and Mr. Steefel was there. I think it was somebody from Wilkie, Farr.

Q You have said that when Mr. Burak made the statement that the opinion letter would not be forthcoming they were surprised. When that thing was made by Burak do you recall whether Mr. Persky was surprised, too?

MR. MANDEL: Objection.

THE COURT: Sustained.

Q Did he appear to be surprised?

A I don't recall one way or the other.

MR. GRUTMAN: I have no further questions, your Honor.

MR. SILFEN: I have no questions, your Honor.

CROSS-EXAMINATION

BY MR. MANDEL:

Q Mr. Abrams, you have acted since the inception of this case until the trial as the attorney for the general partners who are additional defendants on counterclaims in this case?

A Not quite so. Our firm came into the case sometime after the action had been commenced and after Mr. Gross had made counterclaims which named certain of the additional defendants; sometime after that we came into the case.

Q Were you the first attorneys who appeared herein for the general partners when they were brought into the case as additional defendants on counterclaims?

A I do not recollect at this time whether Finley, Kumble had been acting for any of the general partners in connection with the litigation at any stage, whether it was in connection with any prior examinations before trial or not. Their representation, tentative representation, may have been somewhat informal.

Q Do you recall whether your firm drew a reply on behalf of the general partners?

A It collaborated. It was a joint reply.

Q Is it accurate for me to say that the legal fees of the general partners in this case were paid at least up to a certain point by Neuburger, Loeb, Inc.?

A Yes, to us, to our firm.

Q Is it accurate to say that this was done under an indemnity clause contained in the transfer agreement of

February 11?

A That was my understanding, yes. The basis for the payment, the corporation's loss.

Q Is it accurate to say that you were aware of the negotiations which led up to the existence of this indemnity clause in the agreement?

A I was aware of the indemnity clause, but I do not recall ever personally participating in any specific discussion of it or any negotiation of it.

Q You knew that the general partners wanted such an indemnity clause and got it, right?

A Yes.

Q An important reason for the indemnity clause was that the parties to the agreement knew that Gross, Bleich and Donohue had certain claims?

MR. SHAW: Objection. The witness is now being asked to give testimony with respect to the intention of persons other than himself, and, also, he has indicated that he does not have that much knowledge with respect to the negotiations leading up to the clause. So the question is in two respects improper, your Honor.

THE COURT: I fear this is being asked on the question of motive, bias and reliability to this testimony. Mr. Mandel nods his head.

Even though Mr. Abrams is a lawyer these are subjects that may be inquired into and on that basis I have been permitting it and I will continue to permit it.

A The indemnity clause covered many claims among which were any claim that might be made by Gross, Bleich or Donohue.

Q You became aware, at least by the time of the February 5 and February 8 meetings, you have testified, that Gross, Bleich and Donohue contended that this transfer agreement could not legally be made under Section 98 of the Partnership Law without their signatures.

MR. GRUTMAN: I object to that question. The testimony does not include Gross as a person objecting on that basis. He was a withdrawn general partner.

THE COURT: He is a witness here. Let him say what he knows.

A I recall, Mr. Mandel, that you made an assertion at either or both the February 5th and February 8th meetings, in 1971, that the partnership could not transfer its business in assets without Bleich and Donohue's consent.

Q Do you recall my mentioning Section 98 of the Partnership Law?

A I don't remember it, but I would not deny that you said it.

Q Do you recall that I also stated that the forgiveness, the proposed forgiveness of indebtedness of the certain deficit of certain general partners was an illegal inducement to enter into the proposed agreement?

A I don't recall that. I don't recall that. There was something, some talk, about the deficits of the general partners, and whether it was a legal obligation --

All I remember about that, in those meetings there were statements made that the tax refund would have to go to the new corporation if the deal went through. The limited partners, I, Mr. Richenthal previously attended the meeting on behalf of the limited partners --

Q Don't testify about things that did not happen.

A I don't recall.

THE COURT: Stay with the one question. You don't recall Mr. Mandel --

MR. SHAW: He said not to testify about things that didn't happen.

MR. MANDEL: I said in his presence.

MR. SHAW: I didn't hear that.

THE COURT: I want a responsive answer.

A I don't recall that.

Q You were aware that in the proposed transfer agreement certain general partners demanded that part of their indebtedness be forgiven.

A I don't know that they demanded. I know that the transfer agreement provided in effect that what was the tentative computation of the capital deficit, they would pay over -- some of them would pay over a certain portion of it and would also assign their tax refunds to the new corporation.

Q They were also released by the limited partners and others from the balance of their indebtedness to the partnership; isn't that correct?

A Yes. The extent -- yes.

Q Getting back to your being retained by the general partners in this case, is it fair to say that your firm was, in fact, selected by Finley, Kumble or by Neuburger, Loeb & Co., Inc. and nominated to the general partners?

MR. GRUTMAN: I object to that.

THE COURT: Overruled.

A No. I don't think that is so. Alan Gelb called and asked if we would be interested in taking over the representation of certain general partners in this instant litigation, and there was a discussion with him about fees. I knew about the indemnity. I confirmed that the corporation would pay our fees, and then we wrote to each of the general partners whom Finley, Kumble had indicated to us whether we would be interested in representing them and specifically requested whether they would want us to take over their representation in the case when they had been named additional defendants in counterclaims.

Q Alan Gelb was a partner in Finley, Kumble, and was at the time he had this conversation with you?

A That was my understanding.

Q Didn't Gelb tell you in that conversation that the general partners had been brought into the action as additional defendants on counterclaims?

A Yes.

MR. GRUTMAN: Your Honor, can it be clear that the time this occurred is when there might have been a conflict of interest?

THE COURT: This is something that can be brought out.

MR. GRUTMAN: Can we have the time, Mr. Mandel?

Q Was this at the time shortly after the general partners had been served in the litigation?

A This is unclear to me at this time, Mr. Mandel. I really have to refresh my recollection on this. I don't know the interval between when different general partners might have been served and this telephone call. I can place it in point of time though with another event that I know took place, if you want that.

Q Yes. Why don't you.

A It was shortly before the deposition of Andrew Neuburger because -- I will stop, if you want me to -- because I appeared at that deposition. We had not yet filed a formal appearance with you.

MR. GRUTMAN: June 8, 1972.

THE COURT: Mr. Abrams, you have gotten to the point where you said your firm then wrote to these parties who it was suggested you represent. Did you do that?

THE WITNESS: Yes.

THE COURT: Did you get responses?

THE WITNESS: Yes.

THE COURT: What were they?

THE WITNESS: The response was agreement, yes, that they signed the counterpart of the letter I had written.

BY MR. MANDEL:

Q Getting back to your conversation with Mr. Gelb --

THE COURT: You wrote them a letter and said: I understand you are interested in our representing you, and if that is so, sign a copy of the letter and send it back?

THE WITNESS: Yes, and it spelled out the terms of the representation and that the corporation would pay our legal fees.

BY MR. MANDEL:

Q Getting back to your conversation with Mr. Gelb, Mr. Abrams, didn't he tell you that he or somebody else at Finley, Kumble was suggesting you as the attorneys to represent the general partners?

A Yes. In substance. He said in words or substance that we were a logical choice. He felt Mr. Richenthal, in particular, was a very well known and good lawyer, and that we were familiar with the matter, and he thought that therefore we would be a very good choice to represent the general partners, some of the general partners.

Q You had never represented any of these general partners before, had you?

A No, we had not.

Q Not in any way?

A Not in any way.

Q In fact, in negotiating the transfer agreement, the interests of your clients, the limited partners, was opposed at least in some respect to the interest of the general partners?

A I don't agree with that characterization that you make of opposing interests. There might have been some differing interests but I don't think it was an opposing interest.

Q Specifically, isn't it fair to say that in connection with the transfer agreement it was to the interest of the limited partners that the general partners pay in as much money as possible?

A Yes.

Q Isn't it also fair to state that it was to the interest of the general partners in a deficit position that they pay in as little as possible?

A That they voluntarily pay in as little as possible?

Q Yes.

A Presumably, but I do not know the specific intent or state of mind of the general partners. This is just a theoretical statement on my part as to their desires.

Q When you undertook the representation of the general partners in the instant action, was it a fact that Finley, Kumble acted as lead counsel and bore, for the major part, the laboring oar?

A That's correct.

Q Was that the understanding that you reached with Gelb at the outset of your representation of the general partners?

A No. I don't recall that in that telephone conversation. No.

Q When did it develop that you relied upon Finley, Kumble as lead counsel to represent --

A I can't place it. After the Andrew Neuburger deposition, the first session of his deposition that I attended.

Q It is your recollection that this Andrew Neuburger deposition was the first deposition you attended?

A No. Was it Andrew Neuburger or Paul Burak?

Q It was Paul Burak, wasn't it?

A Paul Burak? You are right. I correct myself.

MR. GRUTMAN: March 3, 1972.

A [continuing] I stand corrected. It was Paul Burak's deposition that was coming up.

Q You could recall now that you appeared at the Burak deposition. It was your first appearance and it was also Mr. Roth's first appearance.

A Then I believe Mr. Roth said in substance, that it was his first appearance.

Q Beginning at that point that Roth --

MR. GRUTMAN: I don't understand why we are going at such length to all of this. Mr. Mandel has been 25 minutes on this one issue. He has not touched the merits of what the witness has testified to. The record here is that Finley, Kumble was sued on February 28th. Quite clearly there is a conflict of interest in continuing to represent the general partners.

We were obliged to withdraw as counsel for them and now we have this whole elaborate development of how he was retained by the general partners and how he went to depositions. I fail to see how this is advancing the case in its closing moments.

THE COURT: What about that?

MR. MANDEL: Your Honor, I think I am making headway with relevant evidence. I think it is going to be important, and I think I am taking one step at a time. I hope your Honor feels that I have not been guilty in wasting time generally.

THE COURT: We will go ahead a bit and see what happens.

BY MR. MANDEL:

Q You were aware that there was a conflict of interest between Finley, Kumble and your clients due to the fact that Finley, Kumble was now an additional defendant on the counterclaims?

A I remember Gelb's initial telephone call. Mr. Gelb stated to me that they had been sued and they felt that they could not represent these general partners, words to that effect. What I am saying, I don't know if he used the words "conflict of interest," but he felt they could not because of representing the general partners.

Q Nevertheless, throughout the conduct of the case you were satisfied to allow Finley, Kumble to be lead counsel and bear the laboring oar for your clients as well as theirs.

MR. SHAW: Objection, your Honor.

MR. GRUTMAN: Objection, your Honor.

THE COURT: Why?

MR. GRUTMAN: "Lead counsel" has a very special meaning, and the reason why Finley, Kumble ceased to represent the general partners --

THE COURT: "Lead counsel" has a special meaning. Let's develop what this witness understands is meant by "lead counsel."

What did you understand the relationship was?

THE WITNESS: That Mr. Roth would basically carry the ball, initially, drafts of any pleadings; initially, drafts of any motion papers, drafting of any correspondence, and then he would clear it with the other counsel, such as Mr. Esterman's firm.

Q Mr. Esterman's firm represented Finley, Kumble; is that correct?

A At that point in time.

Q And Mr. Persky?

A Yes.

Q Do you remember there came a time when Finley, Kumble called a meeting of the general partners and said to them, "We are no longer being paid by the corporation and we would like the general partners to contribute towards our fees from this time out"?

A I understand there was such a meeting. I did not attend that meeting.

Q You know that there was such a meeting?

A I was told that there was such a meeting.

Q By whom?

A I forget whether it was Andrew Neuburger or Robert Neuburger.

Q In essence, that proposal was that you continue to be counsel of record for the general partners but that the general partners paid fees to Finley, Kumble as well for carrying the laboring oar.

MR. GRUTMAN: That is objected to. He was not present at the meeting.

MR. SHAW: That's far afield, also, your Honor.

MR. GRUTMAN: I fail to see, your Honor, what this is all leading to.

THE COURT: I gather that Mr. Mandel is endeavoring to show that Mr. Abrams is, in effect, an agent of

Finley, Kumble for this purpose.

Is that it?

MR. MANDEL: And has been close to Finley, Kumble in this matter.

MR. GRUTMAN: To be close or have parallel interests, I don't think it is insidious or worthy of censure or criticism.

THE COURT: I am listening to the proof.

MR. GRUTMAN: I am listening somewhat restively because of its length, and I don't think it is going to the issue.

THE COURT: You may answer.

A I don't know of such procedure. I don't know of proposals made at the meeting.

Q Did you get a copy of the letter that Finley, Kumble wrote to your clients?

A I remember a letter, yes.

Q What did the letter say?

A I do not recall.

MR. GRUTMAN: I object to the contents of a document not in evidence.

THE COURT: Do you have a copy of it?

MR. MANDEL: Not at hand.

THE COURT: What does that mean?

MR. MANDEL: Somewhere back in the file in my office I have a copy of that letter.

THE COURT: Is there a copy of the letter in the courtroom?

MR. GRUTMAN: I don't have that.

MR. SHAW: I don't have that.

MR. ROTHMAN: It may be in the Court file as part of the withdrawal papers. It may take a little time to find.

THE COURT: Is there any substantial dispute as to its contents? The best evidence rule, obviously, would require my getting the file out to see if we could find that paper. If you object to it under the best evidence rule --

MR. GRUTMAN: That's not my objection. I don't know anything about this myself and I am making legal objections on the basis of the Rules of Evidence.

THE COURT: Do you waive the best evidence rule?

MR. GRUTMAN: I will waive it. I am not by doing it inviting the prolongation of this.

BY MR. MANDEL:

Q Do you remember what that letter said, in substance?

A I remember. I remember a letter from the Finley, Kumble firm giving notification that they intended to make a motion to withdraw attorneys.

Q Do you remember why --

A For the corporation.

Q Do you remember why they were writing such a letter to your clients, the general partners?

A I don't recall who the letter was addressed to. I remember receiving a copy of the letter which gave notification that this is what they intended to do.

Q Mr. Abrams, throughout your participation in the conduct of this case you have worked closely and cooperatively with Finley, Kumble; is that correct?

A I worked on certain papers and documents in collaboration with Mr. Roth, specifically.

Q Is that your answer to my question?

A Yes. That's the answer.

Q Did there come a time when you considered whether your clients should assert some kind of cross-claim against Finley, Kumble?

A Yes. I considered it. I had it in the back of my mind.

Q Did you ever discuss that with your clients?

A I mentioned it to some of them. I think basically the Sterns and the Neuburgers.

Q What did you say to them?

MR. GRUTMAN: I fail to see this. What is this?

MR. SHAW: That's quite a question.

THE WITNESS: I feel what I specifically said to my clients in this case, your Honor --

THE COURT: You are asserting attorney-client privilege?

THE WITNESS: If my clients waive it --

MR. GRUTMAN: I would like to make an objection. Mr. Mandel is not suing anybody for malpractice in this case. He is suing my law firm for fraud and conspiracy along with other people. He has now taken five minutes longer than I did on direct examination and he has yet to reach one question on the merits of this witness' testimony. You have an elaborate fandango as to his relationship with ours. None of this rises to the level of anything material, germane, or wrongful. Mr. Mandel is telling he was going to evidence. To my mind the relevant evidence has yet to approach anything remotely relevant. I object to this prolongation.

THE ATTORNEY: The attorney-client privilege is valid. I sustain that.

Q Now, Mr. Abrams, when did Mr. Grutman tell you he wanted you to be a witness in this case?

A Yesterday.

Q What did Mr. Grutman say to you about the purpose of your testimony?

A He wanted me to basically testify about meetings which I participated in. That was the general area that he wanted me to testify about.

He asked me about my qualifications as an attorney.

Q Did he say anything specifically to you about Persky?

A He asked me questions about the meetings that I did attend.

Q Did you meet with Mr. Grutman personally?

A Yes.

Q Did he show you Exhibits FFF and Finley, Kumble V?

A He showed me notes which he told me evidently were taken by Mr. Silverman of meetings of which I attended.

Q Did you use those notes to refresh your recollection of the meeting?

A Yes.

Q Did anybody else say anything to you to refresh your recollection of those meetings?

A No.

Q Did anybody say anything to you about what happened at the closing with Burak?

A No, sir.

Q Was Mr. Shaw present at your meeting with Mr. Grutman?

A No.

Q Who besides Mr. Grutman was present?

A My partner Mr. Moss and Mr. Grutman's associate.

MR. GRUTMAN: My partner Miss Bjork.

Q Did you make any notes of the meetings of February 5 or February 8?

A No.

Q Was Mr. Gross present at the meeting of February 5?

A I have a definite recollection that Mr. Gross was present at one of those two meetings. I am a little unsure as to whether he was present at both.

Q Did you notice in your review of Mr. Silverman's notes that Mr. Gross is listed by initials at the meeting of February 8th?

A There is a reference to C. G.

Q You noticed that?

A Yes.

Q Did you also notice that there is no reference in the notes of the meeting of February 5 to anything said by Charles Gross or anything to indicate that he was present?

A I don't recall. I don't recall the notes.

Q Do you recall whether Charles Gross said anything at the meeting of February 5 or was present?

A I don't have any recollection that at the meeting -- definitely Mr. Gross was present at one of the meetings. Definitely. Without question, in my mind. Probably at another meeting, but I am not sure. But I don't have any specific recollection of Mr. Gross saying too much. Basically, on my recollection, you were doing most of the talking and in fact, one time I think he got a little excited and started to get excited and you calmed him down and, basically, kept him shut up. That's my recollection.

Q You testified that something was said about the Buckley claim at the meeting of February 5.

A Yes.

Q What did you know about the Buckley claim at that time?

A Not very much. You mean specifically? I knew there was -- that apparently there had been an alleged churning of a claim -- of Mr. Buckley by Mr. Gross or Mr. Gross' old brokerage firm, and that there was a claim by Neuburger, Loeb against Mr. Gross, or could assert against Mr. Gross, because they were the originating house. Mr. Gross or his brokerage firm were the originating house and that Neuburger, Loeb had taken a bath in making a statement with Buckley because they lost -- the Westec stock had been margin and they sold it out and lost several hundreds of thousands of dollars and got very little back comparatively.

Q Did you know that the Buckley claim had been settled between Neuburger, Loeb and Buckley?

A My understanding was that there was some kind of settlement and the partnership had the rights to the claim.

Q Had taken an assignment?

A I don't know if the word is "assignment" that was used, but that was my understanding. They acquired the claim.

Q That was the state of your knowledge of that Buckley claim on February 5, right?

A Yes.

Q Where did you get your information about the Buckley claim?

A Basically from Mr. Richenthal, my partner. That was my understanding when I came to that meeting of February 5, from discussions with Mr. Richenthal who mentioned to me that this is what I think he said Steefel told him, or something.

Q Mr. Richenthal told you Steefel had told him?

A That Steefel did, yes. That's my recollection.

Q Did Mr. Richenthal mention Mr. Persky?

A Not to my recollection.

Q Do you remember Persky saying or doing anything at the meeting on February 5 about the Buckley claim?

A No, I don't.

Q Is it your testimony that the only person who mentioned the Buckley claim in any way at the February 5 meeting was Mr. Steefel?

A Yes. That was when Mr. Steefel was given his bill of particulars of the claims that the partners -- basically, it was like the limited partners. He was speaking for the limited partners. What they felt was things that Charles Gross had done wrong or would be liable for because Mr. Gross raised -- it was an accomodation discussion. Mr. Gross made some kind of mention about, "Well, I got claims against them" --

Q This is February 5?

A Yes.

Q You say Mr. Gross was talking?

A I believe Mr. Gross or you.

Q Who was it?

A I do not recall. Mr. Gross was present at one of those two meetings absolutely. There is no question about that in my mind. I remember that specifically. At the other meeting I don't recall whether Mr. Gross was present or not. You were present at both meetings.

Q Let's talk about the February 5 meeting, Mr. Abrams, and I will ask you this question: Did anybody other than Steefel say anything about the Buckley matter at that meeting?

A The only recollection I have is that Mr. Steefel mentioned it in his bill of particulars, the claims against Mr. Gross.

Q Nobody else said anything about the Buckley claim?

A I don't think it was much discussed at that meeting except Mr. Steefel mentioned it.

Q Did I say anything in response to the bill of particulars? By "I", I mean Mr. Phillip Mandel.

A Well, my recollection is -- you basically said that, you know, it's not legal -- words or substance, not admitting any kind of liability of Charles Gross but then the discussion was, "Let's not talk about litigation; let's see about paper."

Q Don't you remember that I said that these so-called claims were nonsense?

A I don't remember the words you used. I think I just said that my recollection is that you, in substance, denied there was any legal liability on Charles Gross' part.

Q Will you search your recollection to see if you cannot remember that at the meeting of February 5 Mr. Persky produced a complaint based on the Buckley matter against Charles Gross?

A No.

Q It never happened?

A No, not in my presence. I was at that meeting.

Q You are sure you didn't forget it?

A Mr. Mandel, I have absolutely no recollection of seeing any complaint produced by Mr. Persky at either of those two meetings that I attended in February.

Q I show you Defendant's Exhibit X in evidence and ask you if that refreshes your recollection in any way.

A No. I don't remember seeing this before. Not at those meetings.

Q Mr. Abrams, when you heard the bill of particulars of the list of claims against Gross, were those claims familiar to you in any way?

A In general. Just in general.

Q Where did you get your information about these claims?

A From Mr. Richenthal.

Q Did he tell you where he got his information about these claims?

A As I recall it, he stated he got his information basically from Mr. Steefel.

Q Do you know where Mr. Steefel got his information?

A No.

Q Did you have any conversation at any time with Mr. Persky about these claims?

A No. I don't recall having any discussion with Mr. Persky.

Q Do you remember, Mr. Abrams, that at the meeting of February 5 I said that Charles Gross was entitled to the return of his capital under the partnership agreement and that he had a claim against all of the other partners for that and if a satisfactory arrangement to him could not be entered into he would just as soon see the proposed transfer agreement dead and there could be a liquidation and he would recover from the partners?

A In substance I believe that's the position you expressed at one or both meetings.

Q Do you remember at the February 5 meeting you said, "Let them try to collect," or words to that effect? Do you remember that?

A Yes. I was asserting a position that I understood the limited partners were taking.

Q What was that position?

A My understanding from Mr. Richenthal was that the limited partners thought that Charles Gross was responsible for the debacle that they were facing, that they were wiped out, and unless a deal was made to go with a new corporation and get reorganization that they would be wiped out in the liquidation and they were blaming Charles Gross.

Q So you were asserting these claims against Gross?

A I was not asserting. Mr. Steefel did the talking. This was the first time that I personally participated in one of these meetings.

Q But at least you participated to the extent of saying, "Let them try to collect"?

A I was backing up Steefel.

Q Did you get any of your information about the claims from the limited partners?

A No. From Mr. Richenthal. It is possible -- just a second -- it is possible in part in a conversation with Mr. Richenthal, with Mr.Kuarte present, and Mr. Kuarte might have said something to that effect, but, basically, it was from Mr. Richenthal.

Q It is true, is it not, that Kuarte really had nothing to do with the management of the business and had very little information about what was going on at Neuburger, Loeb?

A I don't know. There are two parts. I mean, my understanding was from Mr. Richenthal, no he didn't take part in the management. I don't have a recollection one way or the other as to what he knew about what went on.

Do you understand my answer?

Q Yes.

Did anybody tell you that Kuarte had known nothing about the financial situation of Neuburger, Loeb until he had been called into a meeting in November of 1970 and been shocked to be told that his securities had been sold? Is this something new to you or had you heard that?

A I don't recall. I did not have the initial contact with Mr. Kuarte . I don't have a recollection of that. That was Mr. Richenthal.

Q Would it be fair to say that at the meetings of February 5 and February Gross, Bleich and Donohue were negotiating as a unit, were talking about what they would get as a group?. Is that right?

A Basically I understood you were speaking for all three, really.

Q Is it also fair to say that it had been the understanding that all persons present were willing to pay out Jean Donohue $75,000? Do you remember that?

A I was not willing on behalf of the limited partnership. I very frankly -- I think our position, the position of our firm, as one of the three committeemen for the limited partners was somewhat tougher than Mr. Steefel's.

Q Do you remember Mr. Steefel saying at one point, "We can absorb paying Jean but not Mable"?

A Mr. Steefel said: Maybe we can pay one of the two. That's the way of getting money to Charles Gross, going towards his $100,000 minimum figure cash. Pay one of the, but one of them has to go along.

Q Do you remember that there was also a proposal made that either Risher or Kayne, or a combination of them, would buy some of Gross' paper for $25,000? Do you recall that?

A My recollection is one of the alternatives was how the $75,000 that would go to Donohue or Bleich would go to Charlie Gross from them, and how was he going to get the other $25,000 in cash, which was his minimum cash demand. That was one of the proposals.

Risher, Kayne or Muh to put up or buy at a discount some of the assumed limited partnership paper, buy some of it at a discount, buy it at a price of $25,000 cash.

Q Do you recall that at the conclusion of the meeting of February 8th a tentative agreement had been reached which was approved by Gross, was subject to the approval of some people on the other side not present at the meeting?

A I don't remember any agreement being reached.

Q I don't say that an agreement was reached. There was some tentative understanding that was acceptable to the people at the meeting but it was subject to examination by some persons other than the Gross side who were not at the meeting? Do you recall that?

A No. I don't recall it. I didn't have the impression that there had been any agreement even in principle reached. There were suggestions back and forth and there was some proposal that you made. There had been proposed during the course of the meeting but there was no -- I don't recall any handshake deal.

Q Did the February 8th meeting close, to your recollection, with all discussions terminated? What is your recollection of where things were left at the end of the February 8th meeting?

A My impression was that: I don't think we will be able to work out a deal with Gross.

My personal impression was pessimistic, but I don't remember anyone saying no further talks or anything like that, cut off, cut everything off; but I don't recall any agreement in principle being arrived at.

Q February 8th was just three days before February 11th, right?

A Yes.

Q February 11th had already been set as the closing date; is that right?

A I don't remember by February 8th whether February 11th had been set. I don't remember. I know it was going to be within a few days. I don't specifically remember that.

Q Do you remember a letter of February 2nd signed by Persky going to all the parties saying that if Mable Bleich does not agree by February 4th then the deal will be dropped and counsel can make other arrangements for use of their time on February 11th? Do you remember that or not?

A No, I do not.

Q I show you Defendant's Exhibit Z in evidence and ask you if that refreshes your recollection.

A No, it does not.

THE COURT: Mr. Abrams, you say you didn't get the letter or you have no recollection of getting it?

THE WITNESS: I have no recollection whether we got it or did not get the letter. I don't recall my seeing the letter. I don't deny that we may have gotten the letter.

THE COURT: The facts communicated by that letter, was that ever communicated to you by anyone? Did Mr. Richenthal call you down the corridor and say, "It looks like the deal is off"?

THE WITNESS: No. I don't have any recollection because of that, of any such statement. I know I made arrangements to go to this meeting on February 5.

THE COURT: Did Mr. Richenthal get the mail on this case or you?

THE WITNESS: At about that time, shortly before February 5, Mr. Richenthal's wife had a heart attack and Mr. Richenthal had to go out of town to take care of her.

THE COURT: Your office procedures then routed the mail to you?

THE WITNESS: I don't remember the specific date he left. I would get the mail on the matter.

THE COURT: You have no memory whatsoever of the deal being off as is described in that letter?

THE WITNESS: No, I don't.

BY MR. MANDEL:

Q Mr. Abrams, you took the position on behalf of your clients that if Donohue or Bleich or Gross were getting any cash you would not consent to the deal?

A We felt, Mr. Richenthal felt, that they should not get any cash. Mr. Steefel, it is my recollection, was more willing to compromise on that fact.

Q I didn't ask you about Mr. Steefel.

A Our position was -- but we didn't think that any cash should be paid out.

Q Did you take a final position at any time saying, "We will not make a deal if Donohue or Bleich or Gross get cash?"

A No. I don't remember my saying that at the February 5 or February 8 meeting.

Q I am not talking about the meetings now. At any point. Did you have private conversations with Persky about what you were or were not willing to do on behalf of your clients between February 5 and February 11?

A No. I don't remember having discussions with Persky at all except at the closing.

Q Who made the decision not to pay Gross or Bleich or Donohue anything?

A I don't know. One person?

Q As far as you know, who made the decision?

MR. SHAW: Objection, your Honor. This is a characterization or a conclusion. I think he should be asked a question that would relate to evidence and not who in his opinion --

THE COURT: I will sustain an objection as to form.

Q Did there come a time when a decision was made to go ahead with the transfer agreement without the signatures of Gross, Bleich or Donohue?

A Yes.

Q When was that decision made?

A Sometime between the end of that meeting on February 8th as far as I know and the actual closing on February 11th.

Q That decision was made by all of the parties who signed, right?

A Basically, yes.

Q Did you have communications, either person to person or by telephone or by mail, with anybody after the meeting on February and before the meeting on February 11th concerning the question of what was going to be done now?

A The basis of my understanding was that we were going to go ahead in order to salvage the business. That's what the limited partners wanted.

Q To whom did you talk about that?

A With Mr. Richenthal by telephone.

Q So you and Richenthal made a decision?

A Mr. Richenthal, I believe, also was speaking by telephone with Mr. Steefel.

Q Did you talk to Persky?

A I don't have any recollection of talking with Mr. Persky.

Q Did you talk to Steefel?

A It is possible. I might have spoken to Mr. Steefel in that period, but I believe that Richenthal probably spoke with him instead of me.

Q Mr. Burak was representing the general partners. Did you speak to him?

A I don't remember speaking with him.

Q Did you speak to Mr. Bamberger?

A Mr. Persky's assistant?

Q Yes.

A Associate?

Q Yes.

A I have no recollection.

Q Would it be accurate to say that before February 2nd the limited partners were not willing to go along with the deal unless Mable Bleich went along with the deal, and that after February 5th or February 8th the limited partners were willing to go along with the deal with or without Mable?

A I don't know. I don't recall whether this demarcation of February 2nd -- I don't recall the specific position. I know when I was present at those meetings and the in between stage I understood the limited partners would go along without Mable or Jean. They wanted to make a deal. This is the only way they felt they could get out any money out of their investment, the limited partners.

Q Was it your understanding on the night of February 11th that if the deal went through without the consent of Jean Donohue, Jean Donohue would be paid her $75,000?

A Not without the permission of the limited partners.

Q Were the limited partners about to give that permission?

A I don't know.

Q Was it your understanding on the night of February 11th that if the deal went through without the signature of Mable Bleich that Mable Bleich was going to be paid the $75,000 owed to her?

A No. No. There would be no payments to either Mr. Gross, Bleich or Donohue without the consent of the limited partners or the representatives of the limited partners.

Q What was the basis on which the payments would be withheld under your understanding?

A The basis upon whether, one, as to Mr. Gross, what was his actual capital account. Everybody believed it was wiped out. Mr. Gross as represented by you claimed no.

And as far as Bleich and Donohue, whether there were -- by reason of their association with Mr. Gross, whether there were offsets against them.

Q On the Buckley claim?

A There was something else besides the Buckley claim.

Q Whether there was something else or not, at least it was clear on February 11th that the Buckley claim would be used as an offset defense?

A Against Mr. Gross or one of the girls, I believe -- one of the ladies.

Q You knew that on February 11th when the deal was signed, right?

A The limited partners felt that it might be used.

Q Everybody who was there knew it and intended it, right or wrong?

MR. SHAW: Objected to.

A I don't know what anybody did.

THE COURT: Sustained.

Q What was the discussion about the payments to Gross, Bleich and Donohue on February 11th?

A Discussion about payments to them?

Q Yes.

A I have stated there was an agreement, a letter agreement, that was signed that no payments would be made to either Gross, Bleich or Donohue without the consent of the representatives of the limited partners.

Q Was there a discussion about that letter?

A I don't remember any great discussion about the letter. It was just that the limited partners felt that they should not come out or be treated better than the limited partners and the limited partners felt --

THE COURT: When you come to an appropriate time for a recess, please tell me.

Q You knew, Mr. Abrams, that Gross, Bleich and Donohue had not given up any of their claims --

MR. GRUTMAN: This is threadbare. It is repetitious. Isn't there an end to it? It is dog-eared. They didn't sign an agreement.

THE COURT: Mr. Abrams is saying some new things, such as he said that the limited partners knew on that night that the Buckley claim would be used as an offset, which did not come out from anybody here so far.

Q You knew that Gross, Bleich and Donohue had not given up any of their claims against the partnership, right?

A As far as I knew they had not.

Q The corporation had assumed the liabilities of the partners and the partnership?

A In great part, yes.

Q With regard to Gross, Bleich and Donohue, in full and without qualification?

A Correct.

Q You spoke about Gross' capital but isn't it accurate to say that at the February 5 meeting Gross said his capital was about $400,000 and other people said they thought it was about $180,000? Do you remember that?

MR. SHAW: Objection.

THE COURT: Overruled.

A I remember that you or Mr. Gross, if he was there -- I remember you talking most of the time -- gave a figure in the three hundreds.

Q What was the figure?

A $300,000.

Q What was the figure of the people on the other side?

MR. SHAW: Objection, your Honor. How is that relevant? Are we retrying this entire case?

THE COURT: I don't know that this is terribly profitable at this point.

What do you expect to develop here?

MR. MANDEL: He said that the gross capital was small, and I want to place a dimension on it as to what they admitted at this meeting.

MR. GRUTMAN: He said it was wiped out, Judge.

MR. SHAW: What difference when we have accounting testimony and when we have financial statements? Isn't it all superseded by the more definite documents?

THE COURT: Isn't Mr. Shaw right in this position?

MR. MANDEL: All right.

Let me finish where I am going and we will have our recess.

BY MR. MANDEL:

Q What I am saying to you, Mr. Abrams, is this: With knowledge of the partnership obligation and with knowledge of the assumption by the corporation, what was the understanding at the meeting of February 11th as to the various offsets and claims that would be used defensively against Gross, Bleich and Donohue? You have mentioned the Buckley claim. What others?

A Let me make it clear. Maybe I slightly misspoke. There was no discussion of that. It was understood. I understood it on behalf of the limited partners.

Q What did you understand?

A That if Gross -- I understood that Gross, Bleich, or Donohue might try to seek to collect, and I understood the limited partners' position that the limited partners felt, one, that Gross was wiped out; in fact, the limited partners felt they were wiped out unless the deal was made; two, that there was good claims against Gross for what they said was against mismanagement or wrongdoing. There was no discussion of that at February 11th. That was my understanding from the limited partners, from Mr. Richenthal, from Mr. Steefel.

Q And the other parties agreed that the corporation would assert those claims defensively?

A There was no talk about that as far as I can recollect on February 11th. That was my understanding, and the only --

Q From prior meetings? Where did you get your understanding?

A My understanding I got from Mr. Richenthal, I told you originally.

Q When did Mr. Richenthal give you the contents of this understanding?

MR. GRUTMAN: I object. This is repetitious.

THE COURT: Overruled.

A Sometime after in the latter part of 1970. That's all I can specifically remember. That was before I went to this first meeting myself.

Q Mr. Richenthal told you there was an understanding that if a satisfactory deal could not be made with Gross, Bleich and Donohue then the corporation would assert these claims and offsets unless they got the approval of the limited partners to make a settlement?

A That's not what I meant to say. Prior to February 2nd I had been told by Mr. Richenthal that he understood from talks with Steefel that there were claims against Charles Gross which the limited partners could assert: The basketball, the lease, the Buckley claim, the unauthorized trading.

Q And that they would be --

MR. GRUTMAN: Please. This is so dog-eared now.

THE COURT: Overruled.

MR. GRUTMAN: Every witness is a universal funnel for him.

THE COURT: Answer it.

A That was my answer.

Q Mr. Abrams, you made a statement a minute or two ago that you had an awareness of these claims in the latter part of 1970. I heard you say that.

A Sometime then.

THE COURT: Mr. Richenthal told you about these claims?

THE WITNESS: Either the latter part of 1970 or it could have been in January of 1971. I know it was before February 2nd. We came into the situation in the latter part of 1970. So it was, say, in December or January that I first heard from Mr. Richenthal about the situation.

THE COURT: What Mr. Mandel is asking here, as I see it, you earlier said you and the limited partners knew on the night of February 11th; you may not have discussed it but you had an awareness on the night of February 11th that the Buckley claim would be used against Gross and Bleich to offset payments?

THE WITNESS: Your Honor, that's what I am trying to be accurate about here. Would be used? I knew there was a claim and I guess presumably it would be used.

THE COURT: That was your understanding?

THE WITNESS: That's my understanding.

THE COURT: The question is: How far back did you know that? That's what Mr. Mandel is asking you.

THE WITNESS: I can't say. All I can say is sometime before February 5. It would be sometime, I guess, in January, latter January. Along the way, in discussions with Mr. Richenthal, who was mainly handling the case, because of the heart attack of his wife, I got put into it personally.

MR. MANDEL: This is a good time to break, your Honor.

THE COURT: We will have our recess now.

[Recess.]

BY MR. MANDEL:

Q Mr. Abrams, do you remember Mr. Burak saying at the February 5 meeting that he felt all partners should sign the agreement?

A I have no recollection one way or the other.

Q May I show you Exhibit FFF, the bottom of the page, and ask you if that refreshes your recollection in any way.

MR. GRUTMAN: That's not what the document says.

A It does not, Mr. Mandel. You are asking about the last line? The releases? I remember there was talk if a deal was made about releases.

Q You don't remember Mr. Burak saying that he thinks all partners should sign the agrement?

MR. GRUTMAN: Look at that document.

THE COURT: No. It is a question to the witness as to whether he recalls it being said.

MR. GRUTMAN: If the recollection is predicated on the document, the document says all partners signing this agreement -- not what Mr. Mandel puts in sideways.

THE COURT: Mr. Grutman, in law school they taught us that you could refresh --

MR. GRUTMAN: I can't show him an eagle and say it is a camel.

THE COURT: He is a graduate of a law school and a practicing attorney. He can say no as well as the next man.

Q Mr. Abrams, I direct your attention to the night of February 11th. You testified on direct examination about Mr. Burak saying that he would not deliver or could not deliver an opinion letter on behalf of the partnership; is that correct?

A That's correct. In substance that's what he said.

Q And the opinion letter that was contemplated was one that the transfer agreement had been properly authorized on behalf of the partnership; is that correct?

A In effect. I don't remember the specific language but in effect.

Q That's what it was about?

A Yes. In effect.

Q And the problem was Section 98 of the Partnership Law, right?

A That's my recollection.

Q That was the same problem that Mr. Mandel had raised previously, right?

A As I told you, Mr. Mandel, I remember you raising the question. I don't remember your reference one way or the other -- you may have or you may not have mentioned the section.

Q The problem was the same?

A Yes.

Q I would like you to tell me as precisely as you can what Burak said to whom. Did Burak make this announcement to a group?

A I recall him stating, making that statement, in substance, that he could not or would not give the opinion in my presence. I don't know if he made that statement to others.

THE COURT: Mr. Abrams, what you were asked to say, what is your recollection as to just what he said.

THE WITNESS: My recollection is that he said he could not or would not -- I don't remember the exact words -- issue the opinion.

Q Did somebody ask why not?

A No. I don't recall that.

Q You didn't ask him why not?

A No. I don't recall asking him.

Q Did you wonder?

A You were asking me about the operation of my own mind?

Q Yes.

A I assumed he had a question in mind as to whether the agreement, the transfer agreement, was valid without the signatures of the two withdrawn limited partners.

Q That was clear, right?

A In my mind, yes.

Q What did Mr. Persky say?

A At what point of time?

Q When Burak said that.

A At the time that Burak said it -- I don't know what Persky said at any time.

Q Did Bamberger say anything?

A I don't recall.

Q Can you remember anybody saying anything to Burak?

A No. I don't recall any discussion except -- to Burak, no. I recall other discussions that went on at that point.

Q What was the next thing that happened?

A The next thing that happened was that there was a discussion there with lawyers about: Was the opinion necessary? Would the corporation waive it?

Q Who said what about that?

A That I don't recall. I don't recall who said it. It was a group. I think Mr. Steefel was there.

Q Do you remember Steefel saying that without an opinion letter there could be no closing?

A No. I don't recall those words.

Q In substance, did anybody say they insisted upon having an opinion letter or they would not close?

A I don't recall that. I don't recall that. I can tell you what I do recall, in essence, what was said.

Q By whom?

A I don't know. We were standing around in a group and it was basically a consensus of lawyers stating -- whether it was Steefel or some other lawyer I really don't remember -- it was the general consensus that everybody would feel better with an opinion.

Q The fact is that Persky volunteered to give that opinion letter, right?

MR. GRUTMAN: I object to that.

THE C[illegible] This is cross-examination. Overruled.

A In one sense, yes. In the sense that it was asked, talking around there, is anyone willing to give an opinion letter? And who was familiar with it? And Persky said, "I have done research" -- because he was on the corporation side he presumably did research, and he said, "I have done research and I can give an opinion, if it is all right with everybody because I represent the corporation," words to that effect, and then there was a discussion that there was nothing wrong with him giving an opinion as special counsel to the partnership so long as everybody agrees.

Q Bleich and Donohue didn't agree and they were partners, were they not?

MR. GRUTMAN: We heard this.

THE COURT: This is true. They didn't agree.

A They were not present.

Q How many lawyers were there?

A I would say roughly between fifteen and twenty lawyers.

Q All of whom represented the clients who wanted the deal to close?

MR. SHAW: Objection. Of course this is true.

THE COURT: Mr. Abrams, when Mr. Burak said he would not give this opinion or could not give it, did you hear anybody say anything about the timing of his making this announcement?

THE WITNESS: I don't recall, your Honor. The only thing I can say, this is the first time I heard about it. I can only speak for myself.

THE COURT: You didn't hear anybody say: What do you mean coming in at the last minute like this and saying something like that? Why didn't you say this before?

THE WITNESS: The only thing I can say is that there were expressions but I don't remember any words of surprise. I was surprised and I gather that the people that were in this particular group, when Mr. Burak made that statement in my presence, there was some expression of surprise that all of a sudden: What is this?

I don't remember any words in particular, but this was expressions basically of surprise. Whether it was by demeanor or some statements or what, I don't know.

Q Before the closing Persky had never notified you that there would be trouble getting an opinion from Burak or that Burak was having trouble with an opinion?

A No. I had not been notified.

Q Bamberger didn't notify you?

A No. I don't recall being notified.

Q Of all the lawyers in the room nobody but Persky said that they would or could write that opinion letter, right?

A My recollection is that Mr. Persky was the only one in my presence who expressed a familiarity with the problem, partnership law, and if it was all right with everybody else he felt he could give such an opinion.

Q You were willing to rely on Mr. Persky's opinion?

A Yes.

Q You did rely on it?

A Yes, insofar as the limited partners go. Yes.

MR. MANDEL: I have nothing further.

REDIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Abrams, I think we have established that at the time Alan Gelb of the Finley, Kumble firm called you concerning your interest or willingness to consider representing some of the general partners, was it a time subsequent to that company being sued, which took place on February 28, 1972, and the earliest of those depositions was early March?

A It was -- as I corrected myself -- just right before the deposition of Mr. Burak, the first session of his deposition.

Q I think you said you wrote letters to these general partners.

A That's correct. To each of them.

Q Is it a fact that your retention in this matter was on the specific authorization of each of the general partners whom your law firm represented in this matter?

A Their written signatures on a counterpart of the letter requesting or asking if they wanted us to represent them.

Q During the course of time since your law firm entered this matter up until the present you had continued to represent the interests of your clients; is that correct?

A That's absolutely right.

Q Have you in the past in other matters been involved in lawsuits with multiple sets of attorneys?

A Yes.

Q In such situations is it common for one law firm to bear the laboring oar for one side?

A It is not uncommon. Where there is a multiple interest, in some cases where they might be united and others they might have some differing positions -- where there are common positions on specific issues, yes.

Q And the cooperation about which Mr. Mandel asked you relating to your dealings with the Finley, Kumble law firm where joint papers were prepared where collaboration took place, was that on matters you thought were common to the clients you represented and whoever Finley, Kumble represented?

MR. MANDEL: I object as to form.

THE COURT: Yes.

Q Insofar as the representation of your clients, did you consider yourself to be an agent of Finley, Kumble?

MR. MANDEL: I object. It is leading and conclusary.

THE COURT: I will permit it.

A Absolutely not.

MR. GRUTMAN: No further questions.

RECROSS EXAMINATION

BY MR. SHAW:

Q Had there been occasions when you have questioned whether or not certain steps should be taken in the case which might be good for your client and bad for other parties in the case?

A At this point in time I can't recall -- you talk about some kind of legal issue?

Q Yes.

A On legal issues?

I recall discussing certain questions, you know, with Mr. Roth, but I honestly can't recall specifics.

Q Did you attempt to evaluate all those issues from the point of view solely ~~of~~ the interest of your client?

A We always do.

Q Did there come a time when you considered the possibility of a cross claim over against a party in this case?

A Yes.

Q Did you evaluate that issue solely in the context of the best interests of the persons that you represented?

A Yes.

Q Prior to the consideration of that cross claim over, did you have a conversation with Mr. Mandel?

A I don't know whether it was prior to or subsequent.

Q At or about that time?

A Yes.

Q Did Mr. Mandel, in substance, discuss this possible cross claim you might have?

A Yes.

Q Did he say to you that it would be a good idea for you to do so in substance?

A Yes.

Q Did he suggest if you did this the case might be settled?

A I don't recall if he used the words "the case might be settled." The substance was that it was kind of pressure or good claim. It would serve a twofold purpose on behalf of the clients and, you know, in the pressure in the case -- it was twofold.

Q It would relieve the pressure of the case or it would place pressure?

A It would place additional pressure in the case, and at the same time, Mr. Mandel said it would serve the interest of your client too.

Q What do you mean by "pressure?"

A Well, I don't recall any elaboration. There was talk --

MR. MANDEL: Your Honor, all of this is irrelevant.

MR. GRUTMAN: I think it is very relevant.

THE COURT: I will permit it.

A (Continuing.) The statements were in the context that, basically, Finley, Kumble and/or the insurance company was probably the only monied, real monied defendant. Mr. Mandel seemed to recognize or accept the fact in general that the clients we represented in this case were, for the most part, impecunious or even possibly judgement proof, or a great many of them were, as to the extent that the case could be disposed of. There was a real viable defendant which was Finley, Kumble, and/or the insurance claim.

Q How did that involve the cross claim over which you might make on behalf of your clients?

A Basically, in the context that it was something your clients would think about, protection for them.

Q Think about what?

THE COURT: Let him finish.

A (Continuing.) Basically, something that you should consider and your clients should consider. That's what Mr. Mandel, in substance, said. I had this conversation more than once -- and that it would apply pressure on the Finley, Kumble firm.

Q How?

THE COURT: Nobody has brought this out. What are these cross claims?

THE WITNESS: The basic was whether the opinion letter was malpractice.

Q Malpractice?

A Yes.

Q Mr. Mandel mentioned malpractice, negligence?

A Malpractice, negligence.

Q Did he suggest or say anything to the effect that your clients, the people you represented, the general partners of Newburger Loeb, had at one point been the clients of Finley, Kumble?

A I don't remember that in the discussion.

Q Was this a malpractice claim on behalf of the general partners of Newburger Loeb whom you represented against Finley, Kumble?

A Yes.

Q And it was Mr. Mandel's suggestion to you that if you did this it would be a good idea, correct?

A Yes.

Q And it would create pressure, correct?

A Yes.

Q And the case might be settled?

A I don't know if the word "settled" -- I really don't know if that word was used.

I want to say to Mr. Mandel he also said it was twofold: it would be good for your clients.

Q But he would get a judgement against --

THE COURT: He has answered.

Q Did he say how it would be good?

A Well, it would protect them, indemnification, if there was any judgement against them.

I took the position, well, you know, frankly, I had given some consideration to it, but, very frankly, I thought that there was no ground for malpractice because I agree with the opinion right or wrong. I agreed with the opinion, and secondly, as far as our clients were concerned, basically, as I told Mr. Mandel -- and that's what he accepted -- if there was any signature against them I don't see how he was going to collect against them.

Q Because your clients are either judgement proof or bankrupt?

A That's what they tell me.

Q You said that during this period, February 5, February 8, you used the words "let them try to collect" during one of these meetings you attended, correct?

A I may have said something like that in substance. I don't remember the specific words.

Q Was that because that even at that point these people were wiped out?

A My understanding from Mr. Richenthal was that in his opinion they were all wiped out; everybody was wiped out except the subordinated lenders who were in trouble too. That's what Mr. Richenthal told me.

THE COURT: I am only taking it for that basis.

Q Let me ask you this:

In discussing the various claims that existed against Mr. Gross, in addition to what you have told us were there any claims discussed to the effect or in substance that various limited partners, or subordinated lenders, had been induced to become so by Mr. Gross and that Mr. Gross had failed to fully disclose certain things to them.

A I don't recall.

Q You indicated that you knew that the Buckley claim, as well as various other claims, would be used as an offset in the event there was no agreement between all the parties, correct?

A If the deal went through without Bleich and Donahue and Mr. Gross?

Q Correct.

A I presume that.

Q Did you understand that because you recognized that if there was no consent there would be litigation?

A I assumed that.

Q Did you understand --

THE COURT: Mr. Shaw, this is absolutely sheer leading and contrary to what he said. He said he had an awareness of this from Richenthal some time before February 5. That's what he said.

MR. SHAW: If I am leading, I am leading up to a point.

Q Did you understand that if there was no agreement between the parties that there would be a lawsuit?

A At what point in time?

Q On February 5.

A It appeared so to me, yes.

Q Did you realize that on February 5 and thereafter the parties were headed towards a lawsuit?

A After February 5 there was another meeting, and when no deal was made at that meeting, and then they didn't sign a transfer agreement, my understanding was that there would be lawsuits.

Q Did you realize that the lawsuit would involve claims and counterclaims?

A Yes.

Q In your opinion, as of February 10 and February 11, and according to what you knew as of that point, was there anything improper in this?

MR. MANDEL: I object. It is entirely irrelevant. His knowledge was fragmentary.

Mr. Grutman, don't turn around and grin at me.

MR. SHAW: I would like to bypass this.

I think it is relevant in the context that if an attorney does not feel that anything is wrong or improper with respect to the interposition of claims and counterclaims, how can a layman who goes along with this be charged with conspiratorial knowledge or aiding and abetting, something that is improper? There was no deal so there would be litigation. What's wrong with that?

THE COURT: I will permit the answer as to what he personally thought, period.

What did you think?

THE WITNESS: I thought there was nothing improper about it.

THE COURT: When you say "nothing improper about it," what you are saying is that if there was no deal the Buckley claim would be considered against Gross and Bleich?

THE WITNESS: As well as other claims, your Honor.

MR. SHAW: I have nothing further.

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RECROSS EXAMINATION

BY MR. MANDEL:

Q Mr. Abrams, were you present on the argument of the motion in this case when I said in open court before Judge Owen that I believe this case cried out for cross-claims and that some of the parties were considering doing that?

MR. GRUTMAN: Where is that record, your Honor?

THE COURT: Let him answer.

MR. GRUTMAN: I don't recall it. I was here.

THE COURT: Mr. Grutman, I don't care whether you were here or sitting on the bench beside me. The question is to Mr. Abrams, and for you to suggest to him your recollection before he has had a chance to answer, I regard that as highly improper.

MR. GRUTMAN: I think it was improper for Mr. Mandel.

THE COURT: I think Mr. Mandel has every right to ask that question, and for you to suggest to the witness you didn't hear it when he has to answer it, I regard it as highly improper.

MR. GRUTMAN: I apologize, your Honor.

THE COURT: Take your seat.

The question is raised as to whether Mr. Mandel was improperly putting pressure secretly on this man to assert claims. He is trying to bring out that he suggested it in this courtroom. I don't recall it myself, but the witness may. He does not need your coaching.

MR. GRUTMAN: It was not intended as coaching.

THE COURT: That's what it was.

I do not want any more of that.

MR. GRUTMAN: Very well, your Honor.

I apologize to the Court if you misinterpreted what I said. I said: Where is that written?

THE COURT: Let's have the question read back.

[Record read.]

A I don't have any recollection of that, but, Mr. Mandel, I think you said something to me on the telephone that I believe -- my recollection is that you were thinking of or going to or might make such remarks to the Court in some kind of argument.

Q Did you attend the argument of the motion on which permission shoule be granted to bring in individual partners of Finley, Kumble as additional defendants at which Judge Meyer argued as special counsel?

A No. I was not there.

MR. MANDEL: I have nothing further.

MR. GRUTMAN: I do have a few questions, your

Honor.

THE COURT: You may.

FURTHER REDIRECT EXAMINATION

BY MR. GRUTMAN:

Q Mr. Abrams, the subject matter which Mr. Shaw raised with you concerning the importuning of you by Mr. Mandel to implead or crossclaim over against Finley, Kumble, was this a subject you discussed with me last night, or with Miss Bjork?

MR. MANDEL: I object to that.

THE COURT: Overruled.

A No.

Q Before you gave that testimony in court had you advised me of that?

A No.

Q Had you advised Mr. Shaw of that?

A No.

Q Did you recognize that no claim for malpractice against Finley, Kumble could have been asserted by persons who were not the clients of Finley, Kumble?

A Well, the opinion was rendered on behalf of the partnership, so my clients, in this case the general partners, were the then general partners, so they are the clients of Mr. Persky and Finley, Kumble in connection with that opinion. It was an opinion rendered on their behalf as special counsel.

Q If a claim were to be made against Finley, Kumble it would have to be made by persons who were the then clients of Finley, Kumble at the time the alleged malpractice took place, correct?

A Yes. That's my understanding.

Q And Finley, Kumble, to your knowledge, did not represent Mr. Gross, did it?

A Not to my knowledge.

Q At the time of the time of the transfer agreement Mable Bleich and Jean Donohue were represented by counsel other than Finley, Kumble, namely Mr. Mandel?

MR. MANDEL: I object to that. It is leading and it is erroneous and calls for a conclusion.

THE COURT: Overruled.

A To my knowledge, yes.

Q And the time that Mr. Mandel made the telephone call to you importuning you to make a claim against Finley, Kumble, did you understand that he was trying to induce you to assert a claim against Finley, Kumble on behalf of your clients?

A I think it is a fair statement. Yes.

Q Did you infer from what Mr. Mandel suggested to you in that telephone conversation that he was attempting to manipulate a claim --

MR. ESTERMAN: I object to that.

THE COURT: Sustained.

MR. MANDEL: I renew my motion to strike all of this as not relevant to claims of my clients in this case.

THE COURT: I will permit it to stand.

Q Had Mr. Mandel written you a letter about this, about the suggestion that you should bring a claim against Finley, Kumble?

A No.

Q Did he tell you whether or not he had made such a suggestion to Mr. Shaw?

A No.

Q Did he suggest to you that anybody was about to make a claim against Finley, Kumble?

A Anybody?

Q I will rephrase it.

Before the motion that was argued before Judge Owen, when Mr. Mandel sought to name as party defendant to this lawsuit every partner of Finley, Kumble, where Judge Meyer appeared for the law firm, did Mr. Mandel suggest to you that he had made similar overtures to other lawyers and that anybody had expressed a willingness to assert a cross-claim against Finley, Kumble for malpractice or negligence?

THE COURT: That's a wide question.

MR. GRUTMAN: I will narrow it.

A I don't remember him saying anything except what he was saying recommending, suggesting, that on behalf of my clients I bring a cross-claim against Finley, Kumble on the malpractice or negligence on the opinion letter.

Q I will try to refine the question and then I will sit down.

Before any counsel appeared before Judge Owen on the argument when Mr. Mandel said he expressed certain ideas, did Mr. Mandel tell you that any other lawyer representing any other party to whom Mr. Mandel had made a suggestion similar to the one he was making to you about suing Finley, Kumble had responded favorably or had indicated they were going to do such a thing?

A No. I don't remember him discussing this with anyone else.

MR. GRUTMAN: I have no further questions.

THE COURT: Is there anything further?

MR. SHAW: Nothing.

THE COURT: You may step down.

[The witness was excused.]

* * *

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Robert S. Maier

Official Court Reporter
U. S. District Court

Eugene C. Lewis

Phil F. Golden

MR. GRUTMAN: I apologize to the Court. I feel deeply abashed that your Honor mistook my intention. The intention was not to catch the witness.

THE COURT: I accept that statement.

MABEL BLEICH, called as a witness by the defendants Finley, Kumble, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Miss Bleich, if any question which I ask you is not clear to you, please let me know and I will rephrase the question. If my question is clear and you understand it, I would appreciate a direct answer.

You are one of the defendants in this lawsuit, are you not?

A Yes.

Q At one time you were a general partner in the brokerage house of Gross & Company?

A Correct.

Q Is it also true that between 1923 and 1951 your business experience had consisted of working for various firms as a secretary?

A Yes.

Q When Charles Gross bought a seat on the

Stock Exchange, did you then join his brokerage concern?

A Yes.

Q Before becoming a principal in a brokerage house, did you take a course at some business institute to familiarize yourself with the various matters that you have to be dealing with as a principal of a securities house?

A I did.

Q Before going to work in the brokerage concern of Mr. Charles Gross, had you, for a number of years, worked for Mr. Gross' father?

A I did.

Q For how many years had you worked for the Gross family business?

A I guess from about 1930, 1931. I don't remember.

Q Would it be fair to say that for nearly 44 years you have been associated either with Charles Gross' father or with Charles Gross?

A Yes.

Q When you went into the Gross & Company brokerage concern, how much did you invest?

A Originally?

Q Yes.

A I don't remember.

Q Was it about $5,000?

A Could have been.

Q When Gross & Company was dissolved and before Mr. Charles Gross went over to Newburger Loeb as a general partner and you as a limited partner, do you recollect that you got about $80,000 as a distribution for your interest in Gross & Company?

A I don't remember exactly.

Q Do you remember that of the distribution that you got from the dissolution of Gross & Company you invested $75,000 in Newburger Loeb?

A That's correct.

Q When did you do that?

A I guess it was the latter part of 1968, 1969.

Q The principal partner who had been responsible for the success of Gross & Company was Charles Gross; isn't that true?

A One of the principals.

Q Wasn't he the biggest producer?

A He was a trader primarily.

Q Whether it was in trading or in whatever other kind of investment, wouldn't it be fair to say, Miss

Bleich, thatthe driving force and the principal revenue producer for the firm was Charles Gross?

A One of the principals, yes. He was one of the principals.

Q Did you, while at Gross & Company, generate commission business?

A Yes.

Q Much?

A I generated some.

Q How did you do that?

A I was registered and I was entitled to it.

Q What was the bulk of your activity at Gross & Company?

A During the day I spoke with customers, watched the tape; that was the bulk of my activity.

Q Did you have your own customers?

A Yes.

Q As a broker who acted as a registered representative, did you have some familiarity with the meaning of the word "churning?"

A Yes.

Q What did you understand that to mean?

MR. MANDEL: Are we re-opening the churning case at this time?

MR. GRUTMAN: It is in light of understanding the meaning of the Buckley case and the impact it might have on her as a principal in Gross & Company with relation to Newburger. I am trying to explore how sophisticated this lady was in her understanding as to what liability she faced when she made the judgement as to what she would do in the transfer agreement transaction.

MR. MANDEL: Why is that relevant?

THE COURT: You are missing a step which is the key to making this of any relevance at all, and that is that she was aware that this was going to be asserted against her.

MR. GRUTMAN: I am coming to that.

THE COURT: You have got your cart before your horse.

Q Miss Bleich, do you remember having a conversation with Mr. Risher at some time in which he discussed with you the possible impact of the Buckley claim against you?

A Yes.

Q He did discuss that with you?

A He didn't discuss it. He told me.

Q Did he tell you that in the context of the proposals which were being considered for the reorganization of Newburger Loeb & Co.?

A I don't understand you.

Q When --

THE COURT: When was this?

Q When you heard from Mr. Risher, when was it?

A Probably some time in January of 1970, I guess.

Q Would 1971 be correct?

A Yes, 1971. I'm sorry.

Q You knew, of course, by that time that there had been negotiations going on for some time to solve the financial problems of Newburger Loeb? Isn't that true?

A Yes. I had heard of them.

Q You had attended some meetings, had you not?

A I had.

Q Do you remember when the first of those meetings took place which you did attend?

A I guess it must have been November, 1970. I got a telegram or something or other.

Q Did you personally go and attend a meeting with a large number of persons involved in Newburger Loeb?

A Yes.

Q Do you remember where the meeting took place?

A I am very confused with all the facts in the offices and lawyers in this case. I don't know exactly where it was.

Q Do you remember going to a meeting down at 61 Broadway at the offices of Stroock, Stroock & Lavan?

A I know I was there at one time.

Q Was that the first meeting you attended?

A Whatever the first meeting was, was the one I attended. What date it was I don't know.

Q Would it be an accurate statement to suggest that you had the better part of your assets tied up in Newburger Loeb?

A Yes.

Q So what went on in Newburger Loeb was a matter of more than just a passing concern to you; isn't that true?

A Right.

Q When you went to this meeting, did you understand that you were really taking care of your own business?

A I went there to protect any interest I might have.

Q It was an important interest; right?

A Yes.

Q You gave it the best attention which you were capable of?

A I guess I did, but I don't know how good it was.

Q In 1970 you had been active in the securities industry for almost 20 years; isn't that true?

A Yes.

Q You had been a general partner in a brokerage house for about 18 years, and a limited partner in what you thought was a prestigious old line brokerage house for at least two years, right?

A That's correct.

Q Did it come as a shock to you to learn what you did learn at that meeting at Stroock, Stroock & Lavan regarding the depleted financial state of Newburger Loeb?

A Yes.

Q At that meeting did anybody say in your presence that by reason of the financial condition of Newburger Loeb there was a likelihood that the firm would go under?

A Something to that effect.

Q Do you remember someone saying that the general partners would be wiped out?

A Something to that effect.

Q And that the limited partners would be wiped out?

A Could be or would be or might be.

Q Certainly a very serious threat to you and your interest in the firm, right?

A Right.

Q And at that meeting did they also suggest that even the subordinated lenders were threatened with a substantial loss of their investment?

A There was so much talk there I got so dizzy from it.

Q I can appreciate that, Miss Bleich, but as you search back in your recollection do you remember the things that I have just mentioned to you having been said at this meeting?

A Some of the things.

Q At that meeting was the purpose of the people who were gathered together so far as you could ascertain, to find a solution in order to save the business?

A So they said.

Q Did you disbelieve them at that time?

A At times, I did.

Q But at that time did you believe that they were being sincere?

A At which time?

Q That first meeting at Stroock, Stroock & Lavan.

A I believe the attorney was a reputable man and that the firm was reputable.

Q The Newburgers were there, were they not?

A I don't recall. I know they were present at some meetings.

Q And the Sterns were there, weren't they?

A I don't recall.

Q There were people there some of whom you knew?

A Yes.

Q From what you knew, you were all, so to speak, in the same boat, were you not?

A So they tried to tell me.

Q Did you know any reason why you were in a boat different from all the other people in Newburger Loeb? Subordinated lenders, general partners, and the limited partners, they were all part of the same business, weren't they?

A I think some of them had ulterior motives.

Q Really? At that time, whom did you suspect of having ulterior motives?

A I know they didn't want to give me my money.

Q Do you remember, Miss Bleich, that at that time the problem was that the firm didn't have enough capital?

A I was told that, but the figures were so loused up I didn't know what anything was about.

Q Isn't it a fact that you never demanded the return of your capital until either the end of December or some time in January or February of 1971?

A I did not. I went along because --

Q That's not my question. Listen to my question.

Sit back and take a drink of water.

A You are very kind to me. How come?

Q I am always nice.

A No you are not.

Q On Thursdays especially, I am nice, and after lunch I am even better.

I am not trying to ask you anything but what you remember. If my question is not clear, I will rephrase it.

What I am getting at is this: You didn't make a demand on Newburger Loeb to give you back your limited partner investment until either December of 1970 or January or February of 1971?

A I don't remember when I made the demand.

Q When you heard what the state of affairs was of Newburger Loeb in either October or November, did you form the idea then that you wanted out?

A I wanted out with money, yes.

Q If you could get it?

A I guess so.

Q Wasn't it a fact that everybody would have liked to have gotten their money out but couldn't? Isn't that true?

A I don't know the state of mind of other people.

Q Didn't people tell you that the Stock Exchange had objected to the withdrawal of general and limited partner capital?

A I heard that.

Q Didn't they tell you that the solution to the problem which confronted all of you was not in people taking money out but in bringing money in? Do you remember hearing words to that effect?

A I heard words to that effect.

May I add something?

Q No, no. Just for the moment, try to answer my question. Mr. Mandel will ask you questions when I am through.

A I am getting hungry.

Q You trusted the Newburgers, did you not?

A Absolutely, at one time.

Q You respected them, did you not?

A I absolutely did, at one time.

Q Was that true of the Sterns as well?

A Well, I didn't know the young Sterns too much. I knew the old man, Leo Stern.

Q The old man, Leo Stern, he had more than 50 years in Wall Street, did he not?

A I was not there when he started out.

Q I am not suggesting to you you were there, but you knew about it.

When these meetings were had, do you remember that sometime a proposal was made for the reorganization of Newburger Loeb from a partnership to a corporation?

A Yes.

Q At the time you went to the first meeting, the meeting to which you were invited by telegram, did you have a regular lawyer?

A I hope so.

Q Who was your lawyer?

A Mr. Silverman attended the meeting.

Q Mr. Silverman represented you before 1970?

A Yes.

Q He did?

A He represented me only in this instance.

Q The first time you were ever represented by Golenbock & Barell was in the instance of the reorganization of Newburger Loeb?

A Yes, at the meeting.

Q Did you choose Golenbock & Barell on the recommendation of your friend Charles Gross?

A Charles Gross suggested him.

Q When you thought you needed a lawyer, you went to Charles Gross, or did Charles Gross come to you of his own initiative and say, "Mabel, I think you should be represented by Golenbock & Barell"?

A Charles never said that.

Q You went to Charles?

A I asked Charles whom to use. I didn't know any lawyers. I had two brothers that were lawyers that both passed on. I didn't know any lawyers.

Q I'm not trying to agitate you.

My question is this: When you wanted advice you went to Mr. Gross?

A I didn't go to him for advice, sir. I asked him for a good law firm and I had known thefirm of Golenbock & Barell.

Q It was at the recommendation of Mr. Gross that you went to Golenbock & Barell?

A Lawyers don't advertise. Somebody has to recommend somebody.

Q The person whose recommendation you sought was your friend Charles Gross?

A He was not my enemy.

THE COURT: Let's take our luncheon recess now. We shall return at 2:10.

(Luncheon recess.)

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AFTERNOON SESSION 2:15 p.m.

CONTINUED DIRECT EXAMINATION

BY MR. GRUTMAN:

Q Miss Bleich, when you left Gross & Company and joined Newburger Loeb, was that at the recommendation of Mr. Gross?

A No. I wanted to join them.

Q They agreed to have you; is that correct?

A Yes.

Q In addition to investing your $75,000 as a limited partner, were you also employed at Newburger Loeb?

A Yes.

Q In what capacity?

A I worked with the partners, the general partners.

Q Didn't you work primarily for Mr. Harold Richards?

A I worked with him at the beginning.

Q How much were you paid in salary?

A $350 a week.

Q $17,500 a year?

A I don't know what it adds up to.

Q Was it more than you were getting at Gross & Company, the same, or less?

A I think I was drawing $300, but I had a share in the profits.

Q Was it your own determination to put almost all of your capital as a limited partner in Newburger Loeb & Co.?

A I wanted to put up as much as I could so I could get interest on it.

THE COURT: The question was whether you determined to put up the $75,000.

A (Continuing.) It was my own idea.

Q Did you discuss it at all with your friend Charles Gross before you did it?

A I may or may not.

Q Coming back to the discussion which were held at the meetings you attended in the fall of 1970, was that the first time that you learned about the financial condition of Newburger Loeb? You had been at Newburger Loeb from 1968 through the fall of 1970, correct?

A No. 1969.

Q From 1969 to the fall of 1970 you had worked at Newburger Loeb, did you not?

A Yes.

Q You saw your friend Charles Gross almost every working day; is that correct?

A I really didn't see him. I would pass him in the hall and say hello. That's all.

Q Did he, prior to October or November of 1970, ever tell you about the back office losses which had been sustained in 1969?

A No.

Q Did he ever tell you about the operating losses which the firm was suffering up to October or November of 1970?

A No.

Q Did he ever tell you before the meeting that you attended at Stroock, Stroock & Lavan of any threat which had been made by the Stock Exchange to close down Newburger Loeb?

A No.

Q Were you made aware by Mr. Gross prior to November or December of 1970 of any withdrawals from the partnership by people who had been general partners?

A I didn't quite understand.

Q Were you aware that certain people who had been general partners of Newburger Loeb prior to the time you attended that meeting at the lawyers' office had been withdrawing as general partners?

A I heard that.

Q Had you known why?

A No.

Q Mr. Gross didn't tell you?

A No.

Q You didn't ask?

A No.

Q Was there anybody at Newburger Loeb who was closer to you than Mr. Gross on a personal basis?

A I was not on a personal relationship with Mr. Gross. It was strictly business.

Q Despite all the years you had known him?

A That's right. I am much older than he is.

Q I didn't suggest any impropriety, Miss Bleich, but you had been a partner of Mr. Gross for nearly 18 years and you never thought to ask Mr. Gross about what was happening in the firm?

A I never asked.

Q He never told you?

A That is clear.

Q Did you learn that Mr. Gross had at one time been the managing partner of the business?

A There was a bulletin sent out to everyone.

Q You knew that for a period from the middle of 1969 to the latter part of 1970 he had been the managing partner? You knew that?

A I don't recall the dates.

Q Did you know that he either stepped down or resigned as managing partner?

A Yes.

Q You never asked him what the circumstances were that lay behind that exchange in his status?

A No.

Q Did you ever see any financial records of Newburger Loeb during this period of time?

A I saw customers statements.

Q I mean outside of confirmation slips and general ledger slips; did you ever see a financial statement prepared either internally by the firm's comptroller or by the firm's outside auditors?

A Not that I can recall.

Q So would it be correct to say that you had no knowledge or awareness of what the financial strength or weakness of Newburger Loeb was in the latter part of 1970?

A That would be fair.

Q Had you been informed of any meeting that Mr. Gross had had in the latter part of 1970 where he sought to step down as managing partner if he could get his capital turned in?

A I never heard of it.

Q Did you know of the hiring as consultants by Newburger Loeb of Messrs. Risher and Muh?

A After they were in.

Q Did you have any dealings with them?

A Not really.

Q Did you have dealings with a man named Kayne?

A No.

Q Did you know whether Risher, Muh and Kayne had the confidence of the old management?

A The old management?

Q Yes.

A I know at one time they had to step out and then they came back. That I know, Risher and Muh.

Q Did you have any reason to dislike them?

A No.

Q Do you recollect that at some time when these discussions were going on about the formation of the corporation having a discussion with Mr. Risher about the Buckley claim?

A Have any discussion with him?

Q Yes, or having him say something to you about the Buckley claim.

A Only after he knew I was not going along with the corporation. That was the first time I ever heard of it.

Q There was a time then about which you are clear where, after hearing about the plight of Newburger Loeb and its financial predicament and the proposal that had been made to transfer the assets of the partnership to those of the corporation, you agreed to go along with that proposal; isn't that true?

A I did what I thought was for my best interest and everybody else's best interest.

Q I didn't ask you whether it was for your best interests or for anybody else's. The truth is --

THE COURT: The question is whether you initially agreed to go along.

A (Continuing.) My inclination was to go along.

Q Not only your inclination, but what you did in support of your inclination: don't you remember having signed an agreement on December 31, 1970 in which you indicated your willingness to go along with the proposal of transferring the assets of the partnership to that of the corporation? Do you remember signing that?

A That was a provisional agreement.

Q Whether it was provision or not --

THE COURT: Did you sign it?

THE WITNESS: Yes.

Q When you signed that agreement you were represented by Golenbock & Barell, the lawyers Mr. Gross had recommended to you, correct?

A Yes.

Q Did you also know that at the time that you signed on December 31 your lawyer, Mr. Silverman, also represented Mr. Gross' sister, Mrs. Donahue, correct?

A Yes.

Q Mrs. Donahue who lived in Australia?

A Yes.

Q She had been there for many years?

A Yes.

Q Were you in touch with Mrs. Donahue during this period of time from say, October through February?

A I don't believe so.

Q You have no recollection of having called her?

A No.

Q You have no recollection of being called by her; is that correct?

A Right.

Q Mrs. Donahue came to whatever decision she asserted or was asserted on her behalf; have you any idea with whom she spoke in coming to the decision which she made?

A I never tried to guess.

Q Did Mr. Gross ever tell you whether he had been in touch with his sister?

A I don't recall.

Q When you say you don't recall, are you saying that it may have happened and you don't remember, or are you saying that Mr. Gross never told you that he had been in touch with her?

A To the best of my recollection I don't recall. I don't recall.

Q In any event, up until December 30, Mr. Silverman wrote a letter which is in evidence in this case and you heard that in which he said that you were signing the agreement which you did, and he was recommending to Mrs. Donahue that she likewise sign the agreement as being in her best interests.

A I heard that.

Q Did you believe that to be true at the time?

A I don't know whether I believed it or not.

Q At the time you signed the agreement you had spoken with your lawyer, Mr. Silverman, had you not?

A Yes.

Q Had he gone over with you a discussion of the laternatives of what confronted the business and what would happen?

A I don't recall.

Q Do you remember Mr. Silverman telling you that unless there was a reorganization acceptable to the Stock Exchange, the Stock Exchange would suspend Newburger Loeb?

A I don't recall, sir.

Q Do you remember the letter of November 17 issued from the Stock Exchange to Newburger Loeb stating just that?

A I don't recall seeing the letter.

Q Do you remember the letter being introduced in evidence in this case while you were here?

A So much has been --

Q I understand, but searching your recollection, Miss Bleich, don't you remember your lawyer telling you in essence that, "Look, Miss Bleich, either we find an acceptable plan of reorganization or the firm is out of business, and if the firm goes out of business, you won't get your money back"? Don't you remember him saying that?

A I don't believe he said that to me directly.

Q Not directly?

A I don't remember, sir.

Q Are you saying he didn't say it to you?

A I don't recall, sir.

Q Tell his Honor what the reason was for why you signed the agreement on December 31.

A Because it was a provisional agreement and I wanted to make up my mind definitely.

Q Up to that time your mind was favorably disposed because you signed in favor of it, didn't you?

A Not necessarily.

Q Do you know, Miss Bleich, that on the same day that you signed the agreement, within a matter of hours, on the very same day you sent a letter to Newburger Loeb demanding the return of your capital?

A I don't recall the date.

Q But you know that that happened, do you not?

A I do.

Q And the person who prepared the letter requesting the withdrawal of your capital was the same lawyer, Arthur Silverman,, who had represented you and recommended that you sign what you called the provisional agreement?

A I don't recall that, sir.

Q Earlier this morning you told me that you did like the Newburgers and you had no reason to distrust people who came to these meetings you attended, but you learned that they had "ulterior motives." Was that the phrase you used?

A I thought they did.

6 Q Did you think that they had ulterior motives on December 31 when you signed the agreement?

A As I said, it was a provisional agreement.

THE COURT: That's not the question.

THE WITNESS: I am stupid, I know.

THE COURT: Listen to me. Did you think they had ulterior motives when you signed the agreement of December 31?

THE WITNESS: I don't recall the state of my mind at that time.

Q The state of your mind at that time, however, was when you did sign the agreement that was to your advantage and to everybody's advantage; did you not tell me that just a few moments ago?

A I was primarily concerned with my own interests.

Q But having earlier said that by signing the agreement it was to your advantage, everybody else's advantage, would you tell us what you meant by that?

A I don't recall what I meant by it. I wanted to be fair in every way.

Q At the time that you signed that agreement believing that it was in your best interests and everybody else's best interests, did you believe that was so, because by signing it you would be fair to everybody?

A I don't recall the state of my mind.

Q Some time after December 31, did you have a change of heart?

A Yes.

Q Tell me, what did you learn after December 31 that caused you to have this change of heart?

A I don't recall exactly why, but I didn't think the new management was capable.

Q What did you base that on?

A They were very young. The old hands could not take care of it and I didn't see how the new hands could take care of it.

Q Did you know that it was the old hands that had brought in the new hands to help them?

A They could make mistakes too.

Q Did you make any inquiry about the background, the qualifications, and the experience of Messrs. Risher and Muh?

A I just didn't think they would be capable, sir, from observation.

Q How much observation did you have of Mr. Risher and Mr. Muh?

A I saw they were very young and I don't see where they could have had the background and experience.

Q Do you know --

A And they had never been in the security business, as I understood it.

Q Did you know that the Stock Exchange had approved of Messrs. Kayne, Risher and Muh?

A I didn't inquire.

THE COURT: Did you know?

THE WITNESS: I didn't know whether the Stock Exchange had approved or not. I never inquired.

Q Did you know that these young men whose competence you questioned had been responsible for finding a million dollars to be put into the business to save it?

A I had heard that later.

Q Did you learn that these young men, these men whose competence you questioned, had been capable of selling off the basketball team? Did you know that?

A I was not aware.

Q Did you know that these same young men were the persons who were responsible for getting Newburger Loeb out of the clearing business and on to a basis of being a non-clearing firm?

A I was not aware of that.

Q Did you learn that these same young men had helped to resolve the problem of a financially burdensome lease at Number One New York Plaza? Did you know that?

A I was not aware.

Q Nobody told you about it?

A That's right.

Q As a matter of fact, didn't these men try to talk with you after December 31?

A Mr. Risher did.

Q Isn't it a fact that your lawyer, Mr. Silverman, told them not to speak to you?

A I don't know what he said to them.

Q Did you ever tell your lawyer to tell these men to have no direct dealings with you?

A I don't know whether I stated that in so many words.

Q Did you oppose these men trying to persuade you that it was in your continuing best interest to go along with the agreement that you had signed on December 31?

THE COURT: I sustain that. There is no foundation that that's what they wanted to say to her. It is a question of talking with her.

Q You do recall that Mr. Risher spoke with you about the Buckley claim? Didn't he?

A Yes. He threatened me with it.

Q What did he tell you?

A I don't remember the date. Some time in January I imagine.

Q Was that after a time when you had started to express an unwillingness to go along with the reorganization?

A Yes.

Q Do you remember what Mr. Risher said to you?

A He called me into a little cubbyhole of an office and said to me I was not doing Charlie Gross a favor or myself by not going along, and he said to me, "We got the Buckley claim," and I had not heard the name in years.

I said, "What?"

He said, "Westec stock."

I had forgotten there was such a stock as Westec.

Q Isn't it a fact --

THE COURT: What else did he say?

THE WITNESS: He said that if I didn't go along I would be sorry, and threatened me with suit against Gross & Company.

Q Do you remember you previously testified concerning what Mr. Risher said to you? Do you remember giving a deposition?

A Yes.

Q On page 49 do you remember at that deposition being asked the following questions and giving the following answers? I start at line 22:

"Question. And was that the only conversation that you ever had with anyone prior to today about David Buckley?

"Answer. I believe Robert Newburger called me into his office and told me to go along with the incorporation. All I know, if I didn't go along with the incorporation, there would be trouble about Buckley. That is all I know.

"Question. You have testified that this was allegedly told to you by Mr. Risher?

"Answer. Yes, sir."

You are giving those answers, correct?

A I guess if it is there I said it.

Q The testimony was given on December 30th, 1973. Isn't it a fact that what Mr. Risher told you was that there was the Buckley claim, and if the positions could not be reconciled there would be trouble about the Buckley claim?

A And that Charles and I would be sorry.

Q Did he say you would be sorry or that you might be sued?

A He said we would be sorry and we would -- he would enter suit.

Q You would be sued?

A Yes.

Q As a person who has worked on Wall Street for over 20 years, this was not the first time you ever heard about suits against brokerage houses, was it?

A The first time I did.

Q You never heard about a brokerage house being sued?

A I don't recall reading that.

Q You mean having worked on Wall Street for 20 years you never knew of any instance in which a brokerage house was sued by a customer?

A I don't recall reading it, sir.

Q Of any case.

Do you understand what I am asking you?

A Yes.

Q Did you look into the Buckley matter? Did you talk to Mr. Gross about it?

A No.

Q So after Mr. Risher told you that there would be trouble about the Buckley claim is it your testimony, Miss Bleich, that you never made any further inquiry about the merits of the Buckley claim or your possible involvement in it?

A I might have mentioned it to Charles.

Q What did Charles tell you?

A I don't recall.

Q Do you recall what you said to Charles?

A (Pause.)

THE COURT: Do you have a recollection of talking to Mr. Gross or not?

THE WITNESS: Not really. I must have, though. I don't remember.

THE COURT: Do you have any recollection what it was that you said to each other?

THE WITNESS: No. It was many years ago.

Q If you didn't discuss it with Mr. Gross, am I correct in assuming you were not seriously concerned about the Buckley case?

THE COURT: She said she must have.

Q If you did discuss it with Mr. Gross, do I assume you were seriously concerned about the Buckley matter?

A All I know is that Mr. Risher made me cry.

Q Was that because you were afraid of being involved in a lawsuit where $300,000 was involved?

A No. Because he threatened me, and his attorney.

Q Did you ever say anyplace in writing that Mr. Risher threatened you?

A I don't believe so.

Q Before taking the witness stand today, have you had an opportunity to review the deposition testimony which you gave?

A I read it months and months ago.

Q You have a recollection of having discussed with Mr. Risher what was said to you about the Buckley claim in that deposition?

A No.

Q Is it not a fact, Miss Bleich, that before today you nowhere ever said that Paul Risher threatened you?

A Maybe I was not asked the question.

Q Do you remember being asked if you had discussed the claim with Mr. Risher? I refer you to page 43 of your deposition, line 18:

"Question. Did you ever discuss Mr. David Buckley with anyone prior to today?

"Answer. I remember -- I believe his name was Risher. He called me in because I didn't want to go along with the incorporation, and he mentioned to me that if I did not go along, there would be some trouble about Buckley because he had a loss on it or something or other and I never knew about the loss prior to that period."

Do you remember making that answer?

A Yes.

Q In your discussion with Mr. Risher in 1973 you didn't state that he made you cry or that he threatened you, did he?

A I recall more right at the moment.

Q Has your recollection improved by having discussed it with anybody? What is it that has improved your recollection two years after your testimony?

A Just looking at him.

Q You mean that cherubic face threatened you and made you cry?

A Yes. It was not that cherubic then.

Q As time went along and you became aware of the predicament, were you told that the firm would have to fold?

A At the meetings someone or other said it.

Q When that happened, did you sort of become less concerned about others and only want to protect your own self interest?

A No one else would have looked after me.

Q Wasn't Mr. Gross looking after you?

A No.

Q Who got you Mr. Mandel?

A Mr. Mandel at what time?

Q When Mr. Mandel came to represent you, was his representation of you on the recommendation of the same Charles Gross who had originally recommended Golenbock & Barell?

A I don't remember, but I think it came through Mr. Silverman.

Q You don't remember it was Mr. Gross who recommended that Mr. Mandel represent you?

MR. MANDEL: In what connection?

MR. GRUTMAN: In this connection.

MR. MANDEL: In which connection? I object.

MR. GRUTMAN: In this lawsuit. Isn't it true that it was on the recommendation of Mr. Gross that you were retained?

MR. MANDEL: That's right.

Q Does that refresh your recollection?

A I guess so.

Q Do you remember when you resigned from Newburger Loeb?

A Yes.

Q You gave up your job there?

A Yes.

Q You went to another job?

A Yes.

Q Who got you the job?

A Mr. Gross recommended me.

Q To work in the same company where he went to work, a company called Heine & Co.?

A Yes.

Q You are still working there?

A I am unemployed.

Q How long have you been unemployed?

A Since the end of 1972.

Q When Golenbock & Barell were retained by you, did you pay them any fees?

A No.

Q Did you make any agreement to pay them any fees?

A I don't remember signing any papers.

Q Did you ever get a bill from them?

A I don't remember.

Q Did they perform services for you?

A They were at the meetings.

Q And they wrote letters for you, didn't they?

A I guess so. I don't remember the letters.

Q You don't remember they wrote the letter in which you asked for the withdrawal of your capital?

A I guess they did. I don't remember, sir. Please.

Q I am only trying to find out what you do remember. If I get a little hard on you, just tell me.

Do you know who paid the bill for these services rendered to you? It was Mr. Gross, was it not?

A I think he paid some of the bills.

Q He also paid the disbursements, didn't he?

A I guess so. I don't know.

Q When you engaged Mr. Mandel at the recommendation of Mr. Gross, and you and Miss Donahue became his clients, did you sign a retainer agreement with him?

A With Mr. Mandel?

Q Yes.

A I believe I did, yes.

Q Did you agree to pay Mr. Mandel any fee for his services?

A Yes.

Q At some time you decided to change your mind about the position that you had taken on December 31 and not go along with the deal, right? You wanted your $75,000 back, correct?

A Right.

Q Did you think that the firm could afford to pay you that?

A I had understood that Jean Donahue was getting her money, and I didn't want to be in a worse position than she.

Q You told me earlier this afternoon you had not been in communication with Jean Donahue and she had not been in touch with you. Since you knew what was happening with Mrs. Donahue, was it because Mr. Gross was telling you about what was going to happen vis-a-vis

Newburger Loeb and Jean Donahue?

A There was some kind of letter sent out. I don't know who wrote the letter or where. She was supposed to get her $75,000 back.

Q Was that letter sent to you?

A I don't recall. I know I saw something.

Q Don't you know, Miss Bleich, from having sat here in Court this morning, that the contemplation at the time was that $75,000 would be paid over ostensibly to Mrs. Donahue, but that money would wind up in Mr. Gross' hands? Did you know that?

A No.

Q Did you know that Mr. Gross had ever made such a proposal?

A No.

Q Do you recall a letter having been written by you to Newburger Loeb on January 22 in which you stated that the letter you were writing to them was without prejudice to your rights to reject the plan of reorganization in the event that any other limited partner does not consent to the plan and received benefit and treatment not available to you?

A I don't recall the letter.

Q This letter is in evidence.

A It is a very legal sounding letter.

Q It was written by Arthur Silverman and you signed it. This is 29,ss.

MR. GRUTMAN: One of them is addressed to Mr. Berkowitz by Mr. Silverman and the other one is from Miss Bleich to Newburger Loeb.

Q By this period of time, which is to say January 22, 1971, you were being represented by Mr. Silverman or by Mr. Mandel?

A I think Mr. Mandel came in after the papers were served.

Q Up until this period of time you knew that the reorganization plan was moving forward and you knew that Mr. Gross was opposing it and that was because he told you, did he not?

A I don't remember him telling me, sir.

Q Do you recall Mr. Gross telling you he thought that Newburger Loeb consisted of a nest of rats?

A No.

Q Do you recall Mr. Gross telling you that he thought that a group of Johnny-come-latelies were trying to steal the business?

A No.

Q Do you recall Mr. Gross telling you he thought it was a rip-off?

A No.

Q Are you telling us that Mr. Gross never told you any of those things?

A I don't recall anything like that.

Q Your decision not to go along with the deal was based on your own independent determination?

A She was going to get her money and I wanted mine.

Q Apart from the fact that Jean was going to get it, whoever told that to you you don't remember, right?

A It was in a letter someplace. I don't know the letter.

MR. GRUTMAN: Mr. Mandel, do you have such a letter?

MR. MANDEL: There it is. January 15. I offer it in evidence. It has just been handed to me.

MR. GRUTMAN: This is Plaintiff's Exhibit 101. It is already in evidence.

I offer this one in evidence.

The one produced before was in evidence.

(Defendant Finley, Kumble Exhibit KK received in evidence.)

8 Q Besides yourself and Jean Donahue, there

were other limited partners in the same position in Newburger Loeb, were there not?

A I believe so.

Q You were aware that everybody wanted to get their money out, correct?

A Yes.

Q Did you believe that you could get your $75,000 out?

A I thought I could.

Q You based that not on looking at the financial statements, correct?

A That's right.

Q You based it just on what you called "womanly intuition"?

A If you want to say so.

Q You have since looked at the financial statements, have you not?

A Not really.

Q You have since learned that Newburger Loeb lacked the capability to pay you that money?

A So I was told.

Q Did Mr. Gross ever tell you that you could "louse up the deal" or "upset the applecart"?

A I don't recall anything like that.

Q Mr. Gross never suggested to you that by withholding your consent you could apply leverage against the people who wanted the deal to go through so that they would relent and give you your money?

A I wanted my money. Jean was getting hers.

Q You just figured out it was in your best interest to withhold your consent and by so doing you would get your money; is that right?

A I believe so.

Q Did it ever occur to you that if the deal didn't go through and the Stock Exchange closed down Newburger Loeb, not only would Jean not get her money but you would not get your money, and Charlie Gross would not get his and everybody would go bust?

A I didn't believe Risher and Muh were capable of turning things around.

Q Given the alternatives, the same alternatives that existed on December 31, didn't you realize that if the deal didn't go through, there was no transfer agreement, that what would happen on the morning of February 12 would have been the dissolution of Newburger Loeb and the wipeout of all the general partners and all the limited partners?

A So I was told.

Q You were told that?

A Yes.

Q Did anybody tell you to the contrary?

A I don't recall.

Q If nobody told you to the contrary, would you tell us why, confronted with that alternative, you elected not to go along with the deal?

A I didn't want to become part of it. I didn't think they were capable of turning things around, and we would be better off by liquidating and the hell with them.

Q In liquidation you would get nothing.

MR. MANDEL: I object to that. There was no foundation for that.

MR. GRUTMAN: She said a moment ago --

THE COURT: She said she had been told that. That's not proof of the fact.

Q Did you have any information to the contrary which established that if there were a liquidation you would have gotten a distribution? Did you have any such information?

A I don't quite understand.

Q You told his Honor that you had been informed whether rightly or wrongly, but you had been told, that if there were a general liquidation that all the partners and all the limited partners would be wiped out; isn't that true?

A That was stated at one of the meetings.

Q Had you gotten any other information, reliable information, from a source which established that if there were a liquidation you would receive, as a limited partner some distribution?

A I have no idea what you are talking about.

Q I will go slowly, very slowly.

Having told me the information you had received was if there was a liquidation all the general partners were wiped out and all the limited partners were wiped out, and that would include you, I simply ask you to tell us, if you can, if anyone had reliably told you to the contrary, namely that if there were a liquidation you, as a limited partner, would have received the return of your capital? Did anybody tell you that?

A No, but if they dug up $75,000 for Jean, they could pick up another $75,000 for me.

Q Did Mr. Muh ever make any threats or promises to you?

A No. He just questioned me.

Q Did Mr. Gross ever tell you that you should not go along with the deal?

A No. I did it on my own judgement.

Q Did you ever discuss Mr. Gross' plans with him?

A What plans?

Q The plans that Mr. Gross had, whatever they were?

A No.

Q Did you know at the meetings that it was suggested by Mr. Mandel that if Newburger Loeb satisfied Charlie Gross it was a safe assumption that Charlie Gross could get you to go along with the transfer agreement?

A I don't know what Mr. Mandel said.

Q If that was said, Miss Bleich, was it true?

A No. I'm not a puppet.

Q You mean if Mr. Gross was satisfied and made some arrangement with Newburger Loeb he would not have been able to prevail upon you to go along with the transfer agreement, as you said you would on December 31?

A I wanted my money.

Q Everybody wanted their money.

A But I wanted it.

Q And everybody wanted the right. Was there any reason --

A There is no law against it.

Q Was there any reason why you were entitled to your money ahead of any other limited partner?

A (Pause.)

Q Is it just a coincidence, Miss Bleich, that the only people in Newburger Loeb who opposed the transfer agreement were Charles Gross, his sister and his long-time family friend?

A I never thought about it. I knew I wanted my money.

Q Did you ever speak to Mr. Gross about the Buckley claim after your conversation with Mr. Risher?

A I might have mentioned it to him.

Q May Mr. Gross also have agreed with you that you should not go along with the transfer agreement?

A Did he tell me not to go along?

Q Did he ever say he agreed with you?

A That I should not go along?

Q That's correct.

A All I know is that I wanted my money. I didn't want to go along with anything when I was not getting my money. I worked all my life for it.

Q In considering the fact that there was a liquidation and you might have lost it all, did you know of any other alternative where you could have been certain of getting your money?

A I thought I could get it.

Q By demanding it?

A Yes.

Q Did Mr. Gross tell you --

A I saw the letter.

Jean was getting her money and I wanted mine.

Q If Jean was getting her money why did you think you should be treated in the same category as Jean?

A I didn't think I should be treated any worse. I didn't know. I wanted it.

Q Was that because Jean was Charlie's sister and you were Charlie's friend?

A I don't know. I only know I wanted it.

MR. MANDEL: I think this is degenerating into an argument with the witness.

THE COURT: I tend to agree.

MR. MANDEL: I have been patient. I think we should try to finish this.

MR. GRUTMAN: I am not trying to prolong it.

Q When this lawsuit was commenced, you were named as the defendant and you understood that you were named as a defendant because you were a general parnter in Gross & Company; is that right?

A Yes.

Q Did you have a conversation at that time with Mr. Gross as to what you ought to do with this lawsuit?

A I figured the lawyers would take care of it.

Q Didn't Gross tell you you would be better off by going through with this lawsuit?

A He never told me anything like that.

Q You are sure of that?

A (Pause.)

Q Do you remember being asked these questions and giving these answers starting at page 138 of your deposition?

"Question. Has Mr. Gross made any representation to you that you would be made whole regardless of how this lawsuit comes out?

"Answer. He agreed with me that I would be better off.

"Question. Better off what?

"Answer. Financially.

"Question. By going through with this lawsuit?

"Answer. Yes."

Do you remember making those answers to those questions?

A He agreed with me and I thought it was the best thing to do.

Q Had Mr. Gross made any promises to indemnify you or guarantee you anything out of the outcome of this lawsuit?

A No.

Q Has Mr. Gross made any promises to pay your legal fees?

A I am going to pay my own legal fees.

Q Regardless of the outcome of the case?

A On the recovery.

Q And in the event of no recovery?

A I will get recovery.

Q And in the event there is no recovery?

A I have not thought about it.

Q Think about it. Do you intend to pay the lawyer?

A If I have to, he will getit. I don't know any more. I don't know. I am so mixed up here already.

Q At any time in this --

MR. MANDEL: One second. I think I am compelled to say something. I think I have an obligation to say something, as an attorney, at this point.

There is in effect an agreement, I believe, under which Miss Bleich will not be liable for any legal fees or disbursements if she gets no recovery. That is a fact. I believe I am required to correct anything different, anything that she may be mistaken about.

Q Miss Bleich, do you know a man named Robert Persky?

A I saw him at a meeting or two.

Q He was from the law firm of Finley, Kumble?

A Yes.

Q Did he ever represent you?

A Me? No.

Q Did he ever give you legal advice?

A I never asked him for any.

Q Did you ever look to him as your lawyer?

A No.

Q Did you ever rely on him as your lawyer?

A No.

Q Did you ever rely upon his law firm, Finley, Kumble as your lawyer?

A No.

Q At any time?

A No.

MR. GRUTMAN: No further questions.

MR. SHAW: Your Honor, I have a few questions.

CROSS EXAMINATION

BY MR. SHAW:

Q Can you recall if, during this period, January and February 1971, when you were considering whether or not to go along with the transfer agreement, you were in contact with an attorney by the name of Silverman?

A Yes, sir.

Q In addition to being in contact with Mr. Silverman during this period of time, were you in contact with Mr. Mandel?

A I don't believe I was in contact with Mr. Mandel until after I was served.

Q In addition to being in contact with Mr. Silverman during this period of time, were you in contact with Mr. Gross?

A I talked to him. I know the family.

Q On any occasion during this period, January, February, 1971, did you and Mr. Gross discuss Newburger Loeb?

A I don't know what you mean by "discuss"?

Q Of course you discussed it, didn't you? It was the most important thing going on in your life, wasn't it?

A Yes.

Q Your money was at stake, wasn't it?

A Yes.

Q And it was an important matter to you, was it not?

A Yes.

Q Didn't you discuss with Mr. Gross during this period of time what he thought, and didn't you tell him what you thought?

A No. I said, "If Jean gets her money, then I want mine. I don't care."

Q Did you discuss that with Mr. Gross?

A Yes. I told him I was angry about it.

Q Did you discuss the fact that you were angry about it?

A Yes.

Q In addition, did you discuss other aspects of the problem?

A No.

I don't recall.

Q You cannot recall your conversation going back this long a period of time, correct? It is difficult for you?

Let me ask you one question: You have heard Mr. Gross testify and you have heard people testify here in Court that it was Mr. Gross' position that on a liquidation he would be better off; in other words, there should be a liquidation?

A I heard that here in Court.

Q Was that true?

A I don't recall.

Q Did you hear it in Court for the first time?

A I believe I did.

Q Can you recall if during this period back in 1971 Mr. Gross said to you, in substance, that it would be better for there to be a liquidation?

A When?

Q Back in 1971 when --

A I don't recall. I wanted my money and that's all.

Q Would you say that Mr. Gross did not advise you in early 1971 that it was his view that it would be better for there to be a liquidation of Newburger Loeb?

A No. I don't recall that at all.

Q You cannot recall one way or the other?

A I don't remember.

Q I believe you indicated during the beginning part of your testimony, before lunch, that there came a time when you no longer trusted the Newburgers.

A I don't believe I -- well, I just thought they were incompetent later. It was not a question of trust.

Q You thought they were incompetent, correct?

A Yes.

Q I believe you also testified, after the luncheon recess, that you didn't think the new management could handle the business because the old hands couldn't take care of it themselves?

A Yes. That's why I wanted my money right away.

Q I know that. I am asking you whether you testified to that. Did you say that you felt the old hands could not manage the business?

A I thought they had gotten incompetent. I thought that the whole Wall Street was incompetent.

Q They had gotten incompetent, correct?

A Who?

Q The Newburgers.

A I don't know what I know anymore. I don't know what I thought. I have listened to so much testimony here I am dizzy.

Q Can you recall back in 1970 believing that the Newburgers had reached a point where they couldn't handle the business anymore?

A When?

Q Back in 1970.

A 1970?

Q That was when Risher and Muh came on the scene. That was when new faces began to appear, and there were these meetings with limited partners and general partners about the problems in the business.

A I don't know what opinion I had at that time. I don't know anymore.

Q Did you learn, for the first time, when Risher and Muh and the new people came onto the scene how bad business was?

A I had no idea.

Q Was that news to you that business was bad in 1970 when Risher and Muh appeared?

A I know they had a big mixup in the whole place.

Q You mean in the back office, correct?

A Whatever.

Q That was something you knew about before Risher and Muh appeared on the scene, correct?

A I knew about the back office before they appeared on the scene?

Q The big mess they had, yes.

A I guess I knew something about it.

Q Did you hear Mr. Therese testify?

A Yes.

Q Do you remember Mr. Therese? Do you remember him?

A Yes, of course.

Q He was an employee of Newburger Loeb, was he not?

A Yes.

Q Did you hear Mr. Therese testify that after Mr. Gross became a partner he realized that -- and he used a rather vivid word -- something improper had been done to him. Was that true?

A How should I know? All I know --

Q Did that correspond with your knowledge?

A I knew nothing. He never used that term to me.

Q Did you know that there came a time shortly after Mr. Gross became a partner of Newburger Loeb, shortly after he had invested $1 million, shortly after you became a limited partner, Jean Donahue becmae a limited partner?

A I became a limited partner in the early part of 1969.

Q Shortly after this occured can you recall Mr. Gross being advised or telling you that there was a problem to this business?

A He never spoke to me about that, about Newburger Loeb.

Q He never advised you that there was a back office mess?

A No.

Q When you learned that there was a back office mess, did you discuss it with Mr. Gross?

A No. There was a mess all over Wall Street.

Q Did you discuss the mess all over Wall Street with Mr. Gross?

A No. I knew there was.

Q Did you know this from Mr. Gross?

A No.

Q When you learned about the back office mess, was that when you began to distrust the Newburgers?

MR. MANDEL: I believe we have gone far afield. This is irrelevant.

THE COURT: Mr. Shaw, where does this get you?

MR. SHAW: Let me ask one question on this, if I may.

Q Can you recall the earliest date when you knew that there was this problem? Was that shortly after you became a limited partner?

A I don't recall, sir.

Q You have no recollection whatsoever?

A No.

Q Could it have been shortly after you became a limited partner?

A I don't know.

Q You had invested $75,000 in January of 1969, which was a substantial sum of money insofar as you were concerned?

A Absolutely.

Q As you sit here today, can you recall that shortly after you made that investment you realized that there was a problem?

A No, but I knew they were very busy and they were not automated and so forth and so on. Everybody was working overtime.

Q When was the first time you realized that there was a problem, something to be concerned about, with respect to your investment?

A When I got to the first meeting.

Q In the fall of 1970?

A Whenever.

Q Didn't you realize there was a problem during the period when they were going automated, since they were busy and they were running around --

THE COURT: We have been over this now for five minutes.

Q Since the time when you stopped being employed, which, I believe, was in 1972 --

A The end of 1972.

Q -- during the period of 1973 - 1974 to date, have you received any money from Mr. Gross?

A No.

Q Can you recall whether Mr. Mandel advised you, or Mr. Silverman advised you, at any time, that you could institute a lawsuit against the partnership of Newburger Loeb for "a dissolution and for an accounting"? Were those words ever used?

A I don't recall them, sir.

Q Is there any action pending on your behalf wherein Mr. Mandel, or anybody, represents you against Newburger Loeb?

A I don't know of any.

Q Was there ever any conversation with respect to the possibility of bringing an action to dissolve the partnership?

A Bring an action?

THE COURT: Do you know of any other lawsuit?

THE WITNESS: Pending against me?

THE COURT: In which you are a party, pending against Newburger Loeb in any way?

THE WITNESS: No.

Q Can you recall giving the power of attorney to Arthur Silverman?

A I don't recall, sir.

Q Can you recall authorizing Mr. Silverman to make a deal in your behalf?

A I wanted my own deal. I don't recall that, sir.

Q I show you this document and I ask you if refreshes your recollection that you authorized Mr. Silverman in all capacities to act on your behalf?

A (Pause.) I signed it. I gues I allowed it. I don't remember it. I don't remember it.

Q Did you sign it on or about February 10, 1971?

A I guess I did. My name is there.

Q Was it your position as reflected in that document as of February 1, 1971 that Mr. Silverman could make a deal in your behalf?

A I didn't want to go along with it. He knew that.

MR. SHAW: I offer this document in evidence.

THE COURT: That is already in, is it not?

MR. MANDEL: We think it is in.

MR. ROTHMAN: I believe it is in as Finley, Kumble Exhibit U.

MR. SHAW: Nothing further.

THE COURT: Anybody else at the front table?

Gentlemen, we will take our recess at this time.

(Recess.)

THE COURT: Do you have any questions, Mr. Mandel?

Call the next witness.

(Witness excused.)

MR. SHAW: At this point I would like to call Paul Risher.

MR. MANDEL: May I ask on what issues you are calling him?

MR. SHAW: On the issue of the testimony that just has been received, your Honor, which is in no way referred to in the interrogatories, and is in no way referred to in the depositions, and was not mentioned in the cross examination of Mr. Risher or the direct examination.

MR. MANDEL: It is in the depositions.

MR. SHAW: No.

MR. MANDEL: How can you say the depositions didn't say that Risher threatened her when in two separate places --

THE COURT: Just a minute now.

How do you call one witness and then on the basis of that enable yourself to call another witness?

MR. SHAW: I did not call Miss Bleich, your Honor, and the question that brought forth the testimony that she was threatened and made to cry.

THE COURT: I will permit you to inquire into that specific meeting, and that's all.

MR. SHAW: That's all I intend to do.

THE COURT: Mr. Risher, you are still under oath from earlier in the trial.

PAUL D. RISHER, recalled as a witness, having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Did you have a meeting with Miss Bleich prior to February 10, 1971?

A Yes, I did, and the meeting was in the tiny office that I used at Newburger Loeb which Miss Bleich appropriately called "the cubbyhole."

Q Who else was present?

A Just Miss Bleich and me.

Q Tell us everything that occured.

A After having gone forward with all of the agreements up until this point of the time of the meeting, Miss Bleich had changed her mind, and the change of her mind became known to me. I called Miss Bleich in to ask her why she had changed her mind and she was not specific.

I said, "Do you realize what can happen here? Do you realize it is unlikely that the limited partners will get their monies back in the event that the company does not continue in business if it is liquidated?"

Q Anything further?

A I asked her if she understood the seriousness of the situation and, again, she was non-committal.

I asked her if she understood that in the event this transaction did not go through that there would be a substantial amount of litigation. I think I asked here if she had talked with Mr. Gross and if he had anything to say as to her decision. She was non-committal to any questions I asked of her. Tears came to her eyes. I attributed that to the confusion and the terrible pressures that everyone was under at the time, and certainly they were working a hardship on her-- whereupon I terminated the conversation, and that was the only conversatio n I had with Miss Bleich.

Q How long was the conversation?

A I would say five to ten minutes.

Q Is that the substance of what occured?

A Yes.

Q Did you say to her on this occasion, "We got the Buckley claim"?

A No.

Q Did you threaten her with litigation?

A No.

Q To your knowledge, as you sit here today, did you say anything to her on that occasion to make her cry?

A I don't think what I said made her cry. I think the pressure of the entire condition of the firm and the problems that everyone was having as a result of that made her tense. Tears came to her eyes. There is no question about that. She is correct. Tears came to her eyes. I don't think it was caused by anything specifically I said other than reminding her of the tense times we were all involved in.

MR. SHAW: Your Honor, one further document that I would like to place in evidence is the executive committee minutes of Newburger Loeb which I can do either through stipulation or through this witness. I don't know whether there is going --

THE COURT: Show them to Mr. Mandel.

MR. MANDEL: There is no problem with that. I don't think it has anything to do with Mr. Risher.

THE COURT: Do you want to cross examine?

MR. SHAW: I have no further questions.

CROSS EXAMINATION BY
MR. MANDEL:

Q When you called Miss Bleich into your cubbyhole, she was an employee of Newburger Loeb, right?

A Yes, sir.

Q You were running the business, right?

A We had been around, with the consent of the general partners and with the consent of the New York Stock Exchange, and with the agreement and understanding of everyone involved. With all the caveats that that implies, yes, I was running the business.

Q You told her that if she didn't go along with the deal there would be litigation?

A No. My sense of litigation at that time was if the deal did not go through there would be litigation. It was my concern the deal would not go through and the litigation might arise out of its failure to go through.

Q Who would sue who?

A It is my understanding that the limited partners would sue Mr. Gross for various mismanagement and misdeeds and for failure to provide them with information about the firm, and that the litigation could or would arise out of the failure of the transaction.

Q That is the litigation that you had in mind that you warned her of?

A That was the one that was more on my mind than any other.

Q What made you think she would be concerned with litigations brought against Mr. Gross?

A Because Mr. Gross was her friend.

The other reason for talking with Miss Bleich was that she had $75,000 at risk and it seemed to me, and it was certainly my opinion at that time, that it was in the best interests of all the limited partners to go forward with the transaction.

Q In any event, you turned out to be wrong; isn't that correct?

MR. SHAW: We have gone through this. The limited partners got some, creditors were paid, and subordinated lenders were paid.

Q Did you ever write a letter to Miss Bleich about the proposed transaction?

A To her and not to others, or to all limited partners?

Q To all limited partners and specifically to her.

A I am sure I wrote letters to all limited partners.

Q I show you defendant's Exhibit quintuple C in evidence and ask you if you sent that letter to Miss Bleich?

A I sent this letter to her, and I sent this to every limited partner of Newburger Loeb that I knew of, and I say in this letter that a copy of this letter is being sent to Steefel and to Richenthal and to each individual limited partner, and I say in here that since there may not be sufficient time for the letter to re[illegible] the limited partner Richenthal -- it was a broad distribution of this letter.

MR. MANDEL: I offer it in evidence.

MR. SHAW: I have no objection, your Honor.

THE COURT: It will be received.

(Defendant's Exhibit quintuple C received in evidence.)

MR. MANDEL: I have nothing further, your

Honor. I would like to hand this up to the Court.

MR. SHAW: I have a few housekeeping things, your Honor.

THE COURT: The witness is excused.

(Witness excused.)

MR. SHAW: Your Honor, I am about to close. I have a few additional things I would like to read in evidence and have marked and offer. One of them is to read a portion of Mr. Gross' interrogatories, as Mr. Mandel so kindly suggested yesterday with respect to the income he earned during the years subsequent to 1971.

I am reading interrogatory number 16. These are interrogatories sworn to by Charles Gross, May 16, 1975.

"Question. State all income realized, earned, or accrued to Charles Gross by virtue of personal services rendered subsequent to February 10, 1971, together with any income realized in mitigation of damages allegedly claimed.

"Answer: Mr. Charles Gross earned the following income for personal services for the period det forth:

February 10 to December 31, 1971, $18,100.

January 1 through December 31, 1972, $19,972.

January 1 through December 31, 1973, $37,034.

January 1 through December 31, 1974, $97.674.

January 1 through December April 30, 1975, $51,172."

In addition, your Honor, although I know the Court has made a ruling with respect to the offer of the Frank affidavit, which offer was made by Mr. Grutman, I would like to have that affidavit marked as an exhibit for identification and I would like to move its receipt in evidence, even though I anticipate the Court will make the same ruling as previously made.

THE COURT: Mark it for identification. Sustained.

MR. SHAW: May I do that subsequently, or should I mark it right now?

THE COURT: You can do that any time.

MR. SHAW: In addition, I would like to remove the admission in evidence of all documents previously marked for identification, specifically the documents that were identified by Mr. Fitzgerald, the representative of the New York Stock Exchange.

May I make this suggestion? Many of those documents werenot received in evidence upon the grounds of relevancy. I wonder if we could, in any post trial memoranda submitted in this case, reargue the issue of relevancy of those New York Stock Exchange documents.

MR. MANDEL: I don't think that is appropriate, your Honor. I think they have to be admitted --

THE COURT: I will sustain an objection to that.

MR. SHAW: I remove receipt in evidence based on the record as it presently exists.

Could I reserve on plaintiff's Exhibit 130 for the Frank affidavit?

I would like to have this marked as 131 for identification. These are the executive committee minutes of Newburger Loeb.

(Plaintiff's Exhibit 131 marked for identification.)

MR. SHAW: Subject to the receipt in evidence of Plaintiff's Exhibit 131, the executive minutes, I have no further testimony at this time.

MR. MANDEL: My problem with this, your Honor, is that I am confronted with 75 or 100 pages.

THE COURT: What are they being offered for?

MR. SHAW: With respect to various issues, primarily the fact that these minutes, to my knowledge, and the way I interpret them, state nothing with respect to any authorization by the executive committee of any trading by Mr. Gross, specifically any trading in City Investing stock.

THE COURT: You are offering it for the purpose of showing that they do not contain anything having to do with Mr. Gross' trading acocunt, number 900?

MR. SHAW: The 00 account.

THE COURT: The 900 account?

MR. SHAW: That's right.

MR. MANDEL: I think it would be unfortunate to burden the record with such a mass of material. Would it be appropriate to stipulate that those minutes contain nothing to authorize the trading except insofar as we may choose to offer specific minutes or portions of minutes?

THE COURT: That would accomplish Mr. Shaw's desire.

In other words you reserve your right to offer others?

MR. SHAW: There is nothing in this, your Honor. However, there are many other relevant factors --

THE COURT: I will not take it on that basis at this point, Mr. Shaw. There is no opportunity to see what it is, to deal with it. You are not sure what parts of it --

MR. SHAW: I think that certain aspects of the minutes, in addition to relating to the issue of trading, relate for example, to, and I am referring to the December 18th minutes, which reflect 1969, which reflect the fact that the estimate for the year's loss, which is something that is something that is referred to in the counterclaims, was understated by Mr Gross, who said that it was going to be under $1 million. The fact is, I believe the testimony is, the loss in that year 1969 was $1 million two hundred thousand.

MR. MANDEL: I don't recognize that as an issue presented by the counterclaims to counterclaims. If Mr. Shaw wants to put in one paragraph from one minute, just get moving. I will do that.

MR. SHAW: Maybe I can read in whatever I consider is relevant in these minutes.

MR. MANDEL: I have to know what it is.

MR. SHAW: They are all marked with a blue crayon.

MR. MANDEL: I hardly know how to deal with this, your Honor.

May we number these blue crayon marks so we will have a legible record? If I say, "The first one," it will only produce confusion.

THE COURT: Give the page number.

MR. MANDEL: They are not paginated, consecutive.

THE COURT: How many are there?

MR. SHAW: There are 40 pages here. There are probably on each page at least one crayon marking. There is a portion of each page that is relevant and some pages have two notations that are relevant. They relate to the sale of Mr. Gross' seat on the Exchange to Newburger Loeb, which resulted in the subsequent --

THE COURT: We will have to take the time, and you will have to point out each one, and I will look at it and see if it is relevant. Otherwise, Mr. Mandel doesn't know what he is dealing with. I don't know what is in the record when there is a motion made to dismiss.

MR. MANDEL: You will have to do each one.

THE COURT: I don't know whether what you are showing me has any bearing on the issue.

MR. SHAW: Each thing I considered relevant I have check marked.

THE COURT: Go through it page by page with Mr. Mandel. Show him what it is.

MR. MANDEL: Can we do it right now on the record?

On the minutes of November 18th --

MR. GRUTMAN: Could we do it at the end of the day without wasting your time?

THE COURT: I take it you are finished?

MR. GRUTMAN: They could resolve a great many things and leave only for your determination --

THE COURT: You have concluded your case?

MR. GRUTMAN: With the exception of one other matter. I have some executive meeting minutes of my own, and one other item, your Honor, which I should like to have marked for identification, whether your Honor reads it or not.

There was earlier in the trial on an application made by Mr. Mandel, as a matter of either personal proof or conscience reference made to a particular document which reinforced his recollection as to certain events. I have since had my files checked and I have a document which I want marked for identification which is dated December 7, 1971.

THE COURT: Do that.

(Defendant Finley Kumble Exhibit LL marked for identification.)

MR. GRUTMAN: While your Honor may not read that document, having expressed an intention not to do so, the reason I offer it for the marking is that it reinforced the testimony as to the date I had a meeting, which I gave, with Mr. Mandel.

THE COURT: Going through these matters, Mr. Shaw, I think Mr. Mandel is entitled to deal with them right now, so you rest. He can then make his motions with regard to your case, and he can then know what he has to meet and what he does not have to meet.

MR. MANDEL: The first is of the minutes of November 18, 1969, and Mr. Shaw is offering a part of paragraph 4, 4b, which says:

"Charles Gross reported, among other things, that Lou Bracker had been in town around the first of the month and that things looked good."

I think that's irrelevant and meaningless.

THE COURT: Sustained.

MR. SHAW: Let me read the portion I consider relevant.

December 4, 1969, paragraph 3: Charles Gross' seat on the New York Stock Exchange is to be transferred to Newburger Loeb & Company at $325,000. Charles Gross is to get the benefit of any rise during the calendar year of 1971 with the sealing of $400,000. Newburger Loeb & Copmany will then ABC the seat --

MR. MANDEL: I believe that's relevant.

MR. SHAW: It is relevant to the fact that there has been proof that there was a censure of Newburger Loeb or Charles Gross in this case for not complying with the rules of the New York Stock Exchange insofar as the sale of that seat was concerned. As I understand it, it was not with the approval of the New York Stock Exchange.

THE COURT: Correct me if I am wrong. Wasn't this the one where somebody went down to the Stock Exchange and explained this thing and they dropped it?

MR. MANDEL: Right. Perfectly correct.

Furthermore, it is not within the purview of any of the counterclaims to counterclaims even if it was true.

THE COURT: Objection sustained.

MR. SHAW: Paragraph 5 of the same complaint:

Charles Gross recommended a recapitalization plan for Newburger Loeb & Company. Basically it involves the distribution of points at the discretion of the executive committee at $25,000 a point, this money to be considered as non-interest bearing capital. Capital held by a partner over and above the allotted point amount is to be considered either excess capital or subordinated loan bearing interest at the same rate we paid our limited partners. A certain percentage of earned income from point capital is to be retained by the firm. The thought was expressed that this plan would help pave the way in an orderly fashion for incorporation; would help build up our capital and protect the firm against death or departure of any current partner and would put us in a better position to attract desireable outside talent.

MR. MANDEL: That's dated December 5, 1969. I don't know what it is probative of.

THE COURT: I will allow it.

MR. MANDEL: The various problems, advantages and disadvantages were discussed at length. It was decided that if such a plan be implemented it would be wise to implement it at the time we take in our new partners. In order to do that we must act promptly.